In the Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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STATE OF CALIFORNIA,

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Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of California, appearing by its Attorney General, Evelle J. Younger, respectfully requests leave of the Court to file its Complaint against the State of Nevada submitted herewith.

EVELLE J. YOUNGER
Attorney General of the
State of California
Counsel for Plaintiff

STATEMENT IN SUPPORT OF MOTION

INTRODUCTION

This is an action by the State of California against the State of Nevada to establish the California-Nevada boundary from Lake Tahoe to the Oregon border.

Only this Court, exercising its original jurisdiction, can provide the relief necessary to settle a boundary which has been the subject of controversy ranging from scientific dispute to armed warfare for the one hundred twenty-seven years of its existence. The boundary dispute between states is, of course, the most frequent occasion for the invocation of original jurisdiction, Stern and Gressman, Supreme Court Practice § 10.2, p. 394 (Fourth Ed. 1969); Note, The Original Jurisdiction of the United States Supreme Court, 11 Stanford Law Rev. 665, 671, n. 46 (1959), and the most appropriate, since no other tribunal can adjudicate the rights of these two sovereign parties.

Both the California and Nevada Constitutions, as approved by Congress, provide that the boundary in question—that north of the 39th degree north latitude and south of the 42nd degree north latitude—is the 120th meridian of west longitude. Calif. Const. of 1849, Art. XII, § 1, (now Calif. Const. Art. III, § 2); Nevada Const. Art. 14, § 1; Act of Sept. 9, 1850, c. 50, 9 Stat. 452; Act of March 21, 1864, c. 36, 13 Stat. 30; Proclamation No. 22, 13 Stat. 749 (Oct. 31, 1864).[1]

In 1863, the Legislature of California authorized a joint survey of the 120th meridian, and Nevada's Governor agreed to participate. Calif. Stats. 1863, C. 402, p. 617; Annual Report of the Surveyor General of California, p.

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1. Although the Nevada Constitution provides for a western boundary fixed by "the forty-third degree of west longitude and eastern boundary line of the State of California," the reference to the forty-third degree was apparently erroneous and has never been observed or even suggested as an alternative boundary. See Van Zandt, "Boundaries of the United States and the Several States," Geological Survey Professional Paper 909, p. 158 (U.S. Govt. Printing Office 1976). Even if it were proposed as an alternative, it appears that the stated occupancy description should control. (Powell, The Law of Real Property § 890, pp. 210-214 (1977)).

35 (1863). Under the California State Surveyor General, J. F. Houghton, and the Commissioner for the Territory of Nevada, Butler Ives, a line was surveyed and marked. This line was subsequently adopted by both California, (Stats. 1864, C. 455, p. 506; Stats. 1943, C. 134, p. 898), and Nevada (Stats. 1864-5, p. 134), as the interstate boundary.

Although the "Houghton-Ives" line remains to this day the statutory boundary, it was recognized only for eight years. In the early 1870's the United States General Land Office employed Allexey W. Von Schmidt to resurvey the eastern boundary. Von Schmidt's survey was completed and marked by 1872. Since that date both states have utilized the Von Schmidt line in exercise of criminal and civil jurisdiction, levying taxes, and providing governmental services.

However, irregularities in the "Von Schmidt" line were suggested in limited resurveys conducted by surveyors Grunsky and Minto in 1889 and by the United States Coast and Geodetic Survey in 1893.

Thus, although the State of Nevada has, for 105 years, acquiesced in California's jurisdiction over lands between the 1863 "Houghton-Ives" line and that established by Von Schmidt, by statute she asserts jurisdiction to the "Houghton-Ives" line some 3000 feet to the west.

I. BACKGROUND OF CONTROVERSY

This Court is asked, in this action, to give finality to a boundary which has been the subject of continuous dispute and controversy since its establishment in 1849. *E.g.*, "Honey Lake: the Sagebrush Secession," Hinkle, Sierra Nevada Lakes, (Bobbs-Merrill Co. 1st Ed. 1949); Mack, "Nevada," pp. 398-402 (Arthur Clark Co. 1936). It led to a brief "sagebrush war" in February, 1863, Hinkle,

supra, and to the anamolous situation in which one city, the location of which was in dispute, elected at once the speakers of both the Nevada and California state assemblies. Mack, *supra,* at 404.

A. The California-Utah Boundary Established in 1850: The 120th Meridian First Designated as the Eastern Boundary of California.

On the same day that California was admitted as a State, the Territory of Utah was formed to include roughly the areas that are now Nevada and Utah. Act of Sept. 9, 1850, C. 51, 9 Stat. 453. The new territory was to be "bounded on the west by the State of California. . . ."

The Carson Valley and other areas adjacent to the then California-Utah boundary were soon settled, and questions arose almost immediately as to the jurisdiction of communities separated from California's courts and officers by the Sierras, and from Utah's capital by hundreds of miles of desert. Angel (Ed.) History of Nevada 11-19 (Oakland, 1881). The Surveyor General of California was requested to determine the location of the boundary with respect to the Carson Valley in 1852. Though no complete survey was made, he investigated and, with commendable candor, concluded that the valley lay beyond California's borders. Annual Report of the Surveyor General 14, (Dec. 15, 1852), Calif. Sen. Journal (1853 Reg. Sess.), App. Doc. No. 3.

In February, 1853, residents of the Carson Valley petitioned the California Legislature for annexation on the grounds that they were neglected by the Utah government and at the mercy of bands of criminals from California. Calif. Sen. Journal 90, 130-131 (1853 Reg. Sess.), App. Doc. No. 46. They continued their attempts to join California for several years, Calif. Assembly Journal 141, (1855 Reg.

Sess.). See First Biennial Report, Nevada Historical Society 1907-1908, pp. 122-123 (Nevada State Printing Office 1909). *See,* generally, Thomas, "The California-Nevada Boundary," Annals of the Association of American Geographers, vol. XLII, p. 51 (March, 1952).

California then urged Congress to provide for a survey of the eastern border, but to no avail. Stats. of 1858, C. 21, p. 356.

B. Nevada Territory Is Formed: The Crest of the Sierras Authorized As an Alternative Boundary.

The next significant step was formation of the Territory of Nevada, with a conditional western boundary to run along the crest of the Sierras (*i.e.*, . . ." . . . to the dividing ridge separating the waters of Carson Valley from those that flow into the Pacific; thence on said dividing ridge northwardly to the forty-first degree of north latitude . . .", but only

> "Provided that so much of the territory within the present limits of the State of California shall not be included within this Territory until the State of California shall assent to the same." Act of March 2, 1861, C. 133, 12 Stat. 209-210.

A bill which would have given California's approval to the new boundary failed in 1861. Calif. Sen. Journal 535, 559, 862 (1861 Reg. Sess.)

Although, as indicated above, California declined to accede to the proposed Sierra Crest boundary, she agreed to cooperate with Nevada in a joint boundary survey. Calif. Senate and Assembly Journal, App. No. 34, pp. 31-32 (1863); Stats. 1863, C. 402, p. 617.

C. Controversy Turns to Violence: The "Sagebrush War."

Meanwhile, the ambiguity of the California-Nevada line was causing serious uncertainties that culminated in a brief war over the jurisdiction of lands north of Lake Tahoe. There, the Territory of Nevada organized Roop County in 1862. This county was to extend to Nevada's western boundary, then arguably the crest of the Sierras. Laws of Nevada Territory 6 (1862). This presumed boundary of the new county therefore appeared to overlap that of California's Plumas County, which bordered on California's unmarked eastern boundary. The Nevada Legislature validated all rights acquired in the border zone under California law, and authorized the transfer of pending cases to Nevada courts. *I.d.*, pp. 37-39. Residents reportedly claimed residence in California or Nevada depending upon which tax collector was demanding payment. Thomas, "The California Nevada Boundary," *supra* at 59. Mack, "Nevada," *supra* at 399.

At the first session of the Nevada Circuit Court in Susanville, a Roop County judge issued an injunction against his Plumas County counterpart restraining him from holding court in Roop County. When the judge ignored this order, he was fined for contempt of court, imprisoned, then released on parole. A Plumas County judge then issued an injunction against both the judge and sheriff for Roop County, which was promptly countered by another Roop County injunction against the California sheriff and his deputies.

Meanwhile, the Plumas County Sheriff arrested the Roop County Sheriff and judge, charging them with usurpation of office. They were released by a body of Nevadans. The Plumas Sheriff then gathered a posse of 180 men and, with a small cannon, returned to the disputed area. In the ensuing battle of several hours' duration, several persons were

wounded. Finally an armistice was arranged and agreement made to refer the dispute to the Governors of Nevada and California. Mack, Nevada, *supra* at 399-402.

Similar problems were arising in the south where in 1861 California had established Aurora as the county seat of Mono County. Stats. 1861, C. 233, p. 235. Nevada, acting in the belief that Aurora was within its territory then made it the county seat of Nevada's Esmeralda County. California and Nevada judges functioned side by side, and in the September, 1863 election, citizens were permitted to vote at once for both Esmeralda and Mono County officers and state representatives. An Aurora resident was elected to the California Assembly and another to Nevada's lower house. Each was chosen speaker of his respective body. Mack, Nevada, *supra* at 404.

II. SURVEYS AND INVESTIGATIONS OF THE 120th MERIDIAN BOUNDARY

1. *The Goddard Survey of 1855.* Acting under instructions from the California Surveyor General, George C. Goddard made a limited survey to determine the location of California's eastern boundary with reference to the Carson Valley. Calif. Assembly Journal 7th Sess., App. Doc. No. 92; Sinclair, "The Oblique Boundary Line Between California and Nevada," Report 1900; App. 3 Report of the Superintendent of the Coast and Geodetic Survey 1899-1900, pp. 264-266 (Govt. Printing Office 1900).

2. *The Higley Survey of 1860.* The first survey purporting to locate the 120th meridian north of Lake Tahoe was performed by H. A. Higley, California State Surveyor General. The work was done under authority of an 1859 act of the State Legislature. Calif. Stats. of 1859, C. 291, p. 313. Higley apparently projected north Goddard's determination of the 120th meridian, to a point approximately

35 miles north of Lake Tahoe. At that point he was informed of an upcoming federal survey of the same boundary line, to be performed by U.S. Commissioner Sylvester Mowry. Higley therefore terminated his work in favor of an anticipated joint effort with the United States. *See* Uzes, "California-Nevada Boundary," Report of California State Lands Commission (March 25, 1977).

3. *The Mowry-Ives survey of 1861.* The first surveying effort attempting to fix the eastern boundary of California and Nevada under Congressional authorization was performed by Sylvester Mowry and Lieutenant Joseph C. Ives. 12 U.S. Stat. 110, Cong. Globe, 36 Cong. 1 sess. 475 (1860). This party, however, was successful only in fixing two points: the point where the Colorado River intersects the 35th degree of latitude and the location in the southeastern corner of Lake Tahoe of the angle formed by the oblique line extended from the Colorado River point to the 120th meridian. Report of Interior Dept., 1861-1862, p. 490; Mack, Nevada, *supra* at 392.

4. *The Houghton-Ives line of 1864.* Continuing uncertainty led to California's decision to authorize a survey to establish the state's eastern boundary and to request the Governor of Nevada to join in such a survey. Calif. Stats. of 1863, C. 402, p. 617. (California's Surveyor General had urged such a survey each year from 1855 to 1861, Calif. Sen. J., 4th Sess. to 14th; App., Reports of Surveyor General, 1855-1861). Butler Ives was appointed Commissioner of Nevada by Acting-Governor Orion Clemens, Surveyor General J. F. Houghton was authorized to represent the State of California, and John Kidder was appointed engineer-in-chief. Annual Report of the California Surveyor General, pp. 35-36 (1863). Although problems of terrain and hostile Indians were severe, *Id.*, pp. 35-46 (1863), they succeeded in establishing a common boundary line north of

Lake Tahoe which was accepted by both California and Nevada. Calif. Stats. of 1864, C. 455, pp. 506; Nevada Stats. of 1864-1865, p. 134.

The "Houghton-Ives" line remains the *statutory* boundary from Lake Tahoe to Oregon to this day. Calif. Govt. Code § 160.

The "Houghton-Ives" line, however, was never recognized by Congress despite the recommendations of the United States Commissioner of the General Land Office. Messages and Docs., Interior Dept., 1866-1867, p. 374; *Id.*, 1871-1872, p. 54. *See* Report of Nevada Historical Society, 1907-1908, *supra,* at 131.

5. *The "Von Schmidt" survey of 1872.* When variations were found in a subsequent survey of the northern boundary of California, the United States Commissioner of the General Land Office succeeded in obtaining Congressional authorization for another survey of the California-Nevada line. Messages and Docs., Interior Dept. 1871-1872, p. 54; Act of June 10, 1872, C. 415, Stat. 358. This work was done by contract with Allexey W. Von Schmidt, who surveyed and marked the line recognized in fact by both states since 1872. Messages and Docs., Interior Dept. 1873-1874, p. 7; 1874-1875, p. 13. At the north shore of Lake Tahoe, Von Schmidt moved the earlier "Houghton-Ives" monument some three-fourths of a mile east and replaced its original date—1863—with "1872." "Report of the Civil Engineers on the State Boundary Line," Report of the Surveyor General of California, 1888-1890, p. 16 (1890).

6. *The Grunsky-Minto survey of 1889.* In 1889, the California Legislature passed an act directing the State Surveyor General to "correct and establish that portion of the eastern boundary line of the State . . . southeastward from Lake Tahoe" (i.e., southeast from the intersection of

the thirty-ninth degree north latitude with the one-hundred twentieth meridian of longitude). Calif. Stats. 1889, C. 31, p. 38. The Surveyor General appointed C. E. Grunsky and William Minto to make the required survey. Report of the Surveyor General of California, 1888-1890, p. 12-13 (1890). They reported that the line monumented by Von Schmidt was "one thousand six hundred and nine feet too far west at the northern shore of Lake Tahoe." *Id.* at 15.

7. *The Coast and Geodetic survey of 1893.* In 1893 Congress authorized a resurvey of the oblique boundary between California and Nevada, from Lake Tahoe to the Colorado River. 28 Stat. 380, 921. Although this survey was, by definition, to begin at the intersection of the 120th meridian and the 39th degree of north latitude and proceed south to the Colorado River, it led to reexamination of the boundary at the north shore of Lake Tahoe. It was concluded that the Von Schmidt monument had been placed 1727 feet too far west. "The Oblique Boundary Line Between California and Nevada," Coast and Geodetic Survey Report 1900, App. No. 3, p. 284. The report, which concluded that with respect to its survey of the southern boundary, Nevada gained 321 square miles (*Id* at 314), summarized its findings with respect to the north shore of Lake Tahoe as follows:

> "Undoubtedly the meridian north from Lake Tahoe is in error, but the appropriation does not provide for this. If found to be a serious matter, it can be corrected in the future." *Id* at 368.

CONCLUSION

Since its establishment in 1872, the "Von Schmidt" line has been observed by both states in assessments, the levy of taxes, and the enforcement of civil and criminal jurisdiction. Nevertheless, this line never has been approved by

Congress. The *statutory* line as defined by the two states remains the earlier "Houghton-Ives" line, 3000 feet to the west. The ever-present possibility of challenges to long-standing jurisdiction brings this request for judicial relief.

Thus it appears that the boundary between California and Nevada from Lake Tahoe to Oregon is in serious need of judicial clarification. Although the federally approved boundary is the 120th meridian, the proper placement of this line is in serious doubt:

1) The "Houghton-Ives" line—the statutory line—set forth in the laws of both states since 1864 has not been observed for the last 105 years, but could be raised at any time as a defense to a criminal proceeding, grounds for a refusal to pay taxes, or a rationale to engage in business prohibited by the laws of one state but permitted by the other. *Cf. Pope v. Blanton,* 10 Fed. Supp. 18 (N.D. Fla. 1935) modified in 299 U.S. 521 (1936).

2) The "Von Schmidt" line—observed by both states since 1872—has no basis for recognition in statute.

3) Later investigations have raised the spector of a third line, neither sought nor observed by either state, some 1727 feet east of the presently recognized "Von Schmidt" line.

The uncertainty of these lines has already caused the introduction of a resolution in the California Legislature calling for action to "unify and defend" the California-Nevada boundary. Assembly Concurrent Resolution 34 (1977-78 Reg. Sess.), Exhibit "A" hereto.

The need for prompt clarification precludes resort to compact legislation. We are informed that the Nevada Legislature will adjourn during the month of April, 1977, and will not return until January 1979. The additional need for Congressional ratification would mean no less than two and a half years in which titles would be clouded and jurisdiction in doubt.

Only this Court exercising its original jurisdiction can bring certainty and settle the serious concerns of both states by accepting the complaint submitted herein and issuing an interlocutory order preserving the rights of the parties and persons acting under the authority of their laws during the pendency of this action.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the State of California

N. GREGORY TAYLOR
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EXHIBIT A

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

Assembly Concurrent Resolution No. 34

Introduced by Assemblyman Cullen

March 29, 1977

REFERRED TO COMMITTEE ON GOVERNMENTAL ORGANIZATION

Assembly Concurrent Resolution No. 34—Relative to the boundaries of the State of California.

LEGISLATIVE COUNSEL'S DIGEST

ACR 34, as introduced, Cullen (G.O.). State of California: boundaries.

This measure would request the Governor and the Attorney General to take such action as is necessary to verify and defend the boundaries of the State of California as they are set forth in the 1849 California Constitution.

Fiscal committee: yes.

WHEREAS, A question has arisen with respect to the correct location of California's eastern boundary from the southern boundary of the State of Oregon, running south on the 120th degree of west longitude to its intersection with the 39th degree of north latitude; and

WHEREAS, It is essential to maintain the integrity of the boundaries of the State of California as they were constituted and set forth in the 1849 Constitution of the State of California; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Governor and the Attorney General of the State of California are requested to take such action as is necessary to verify and defend the boundaries of the State of California as they are set forth in the 1849 California Constitution; and be it further

Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the Governor and the Attorney General.

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STATE OF NEVADA,

Defendant.

COMPLAINT

The State of California appearing herein through Evelle J. Younger, its Attorney General, acting pursuant to the authority and powers vested in him by Article V, section 13 of the Constitution of California, institutes this original action against the State of Nevada.

I

The original jurisdiction of this Court is invoked under Article III, Section 2, clause 2 of the Constitution of the United States and 28 U.S.C. Section 1251.

II

The State of California was admitted to the Union of the United States of America by Act of Congress found in the United States Statutes at Large, vol. 9, p. 452. The act

approved the California Constitution of 1849 which provides in pertinent part:

> The boundary of the State of California shall be as follows: Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects with the thirty-ninth degree of north latitude. . . Article XII, Section 1.

An accurate representation of the placement of this boundary with respect to the two states is attached as Exhibit 1 and incorporated by reference herein.

III

The State of Nevada was admitted to the Union of the United States by Act of Congress and Presidential Proclamation. United States Statutes at Large, vol. 13, Ch. 36, p. 30; and Proclamation No. 22, 13 Stats. at Large, App. p. 63. The Act and Proclamation approved the Nevada Constitution, which in relevant part provides that the western boundary of Nevada shall be the eastern boundary of California and further provides that:

> "all such territory lying west of and adjoining the boundary line herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this state." Nevada Constitution, Article 14, section 1.

IV

Following border disputes that led to armed conflict, the State of California and the Territory of Nevada in 1863 agreed to survey and post the segment of the California-

Nevada boundary north of Lake Tahoe to Oregon; i.e., the one hundred and twentieth meridian between the forty-second and thirty-ninth north latitudes. The survey, which led to establishment of a line hereinafter referred to as the "Houghton-Ives" line, was conducted by California Surveyor General, J. F. Houghton, and the Commissioner for the Territory of Nevada, Butler Ives.

V

The "Houghton-Ives" line was adopted by the California Legislature in 1864 as the eastern boundary line of the State of California (Cal. Stats. 1864, Ch. 455, pp. 506-507, reenacted as California Government Code section 160 in 1943 Cal. Stats. 1943, Ch. 134, p. 896.) It was observed by the State of California from 1864 to 1872.

VI

The "Houghton-Ives" line was adopted in 1865 by the Nevada Legislature as the legal western boundary line of the State of Nevada. Nevada Stats. 1864-1865, Ch. 31, pp. 133-134, 347. It was observed by the State of Nevada from 1865 to 1872.

VII

In 1872 the United States Government through its General Land Office contracted with Allexey W. Von Schmidt to survey, post and monument the one hundred twentieth meridian between the forty-second and thirty-ninth degrees north latitude. This line, hereinafter referred to as the "Von Schmidt" line, was surveyed, posted and monumented. Its location varies from 3000 to 6000 feet east of the "Houghton-Ives" line. It has been recognized and observed by both states and their governmental subdivi-

sions from 1872 to the present time in the provision of governmental services, in assessment and taxing practices, and in the exercise of civil and criminal jurisdiction, and constitutes the lawful boundary between the states by acquiescence.

VIII

There is a controversy between the States of California and Nevada in that by statute, the State of Nevada asserts dominion and jurisdiction to territory over which the State of California has exercised dominion, jurisdiction and control for 105 years for all governmental purposes; such territory being the lands located in the area between the "Von Schmidt" and the "Houghton-Ives" lines. Said area is approximately 3000 feet wide at the north end of Lake Tahoe, and increases to 6000 feet wide further north. The State of Nevada thereby claims right, title or interest in said land adverse to the State of California.

IX

The State of California has, since 1872, continuously exercised jurisdiction in the said territory described in Paragraph VIII above, all without objection from the defendant State of Nevada. The incidents of jurisdiction exercised by said State of California include, but are not limited to, assessments, taxing, the provision of governmental services, and the exercise of police power. Nevada has acquiesced in California's exercise of dominion and jurisdiction, and California has therefore obtained title to the land in question.

X

The propriety of the "Von Schmidt" line has, from time to time since 1872, been questioned in the reports of gov-

ernmental agencies. Said reports have caused uncertainty and the recurring possibility of challenges to the lawfulness of such boundary line on the part of both governmental agencies and private persons. A map of the northern shore line of Lake Tahoe indicating the location of various lines as set forth above is attached as Exhibit 2 and incorporated by reference herein. However, neither the State of California nor the State of Nevada has demanded a resurvey of the "Von Schmidt" line with respect to the affected area, and both states have continuously observed said line since 1872.

XI

The statutory claim of Nevada and the questions raised concerning the boundary more particularly described in Paragraphs IX and X above have created, and will continue to create, uncertainty of titles, and may cause a multiplicity of actions involving the titles to individual parcels, challenges to assessments, the payment of taxes and the defense of criminal actions, and attempts to conduct businesses which may be unlawful in California. The claim and actions of the State of Nevada therefore cause, and will continue to cause, irreparable injury to the plaintiff, for which there is no adequate remedy at law.

WHEREFORE, PLAINTIFF PRAYS:

1. That a decree be entered adjudging the eastern boundary of California between the thirty-ninth and forty-second degrees north latitude to be the "Von Schmidt" line;

2. That a decree be entered adjudging that the State of Nevada has no right, title or interest to any such lands west of the "Von Schmidt" line; and perpetually enjoining the defendant from asserting any right, title or interest to

said land or any part thereof, or from interfering with the possession of California in said land;

3. That this Court issue an interlocutory decree in aid of its jurisdiction prohibiting the State of Nevada, its officers, employees, agents, courts, agencies and political subdivisions from exercising any acts of jurisdiction in the lands west of the "Von Schmidt" line during the pendency of this action;

4. For plaintiff's costs of suit herein; and

5. For such other and further relief as may be proper.

DATED: April 20, 1977.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the State of California

N. GREGORY TAYLOR
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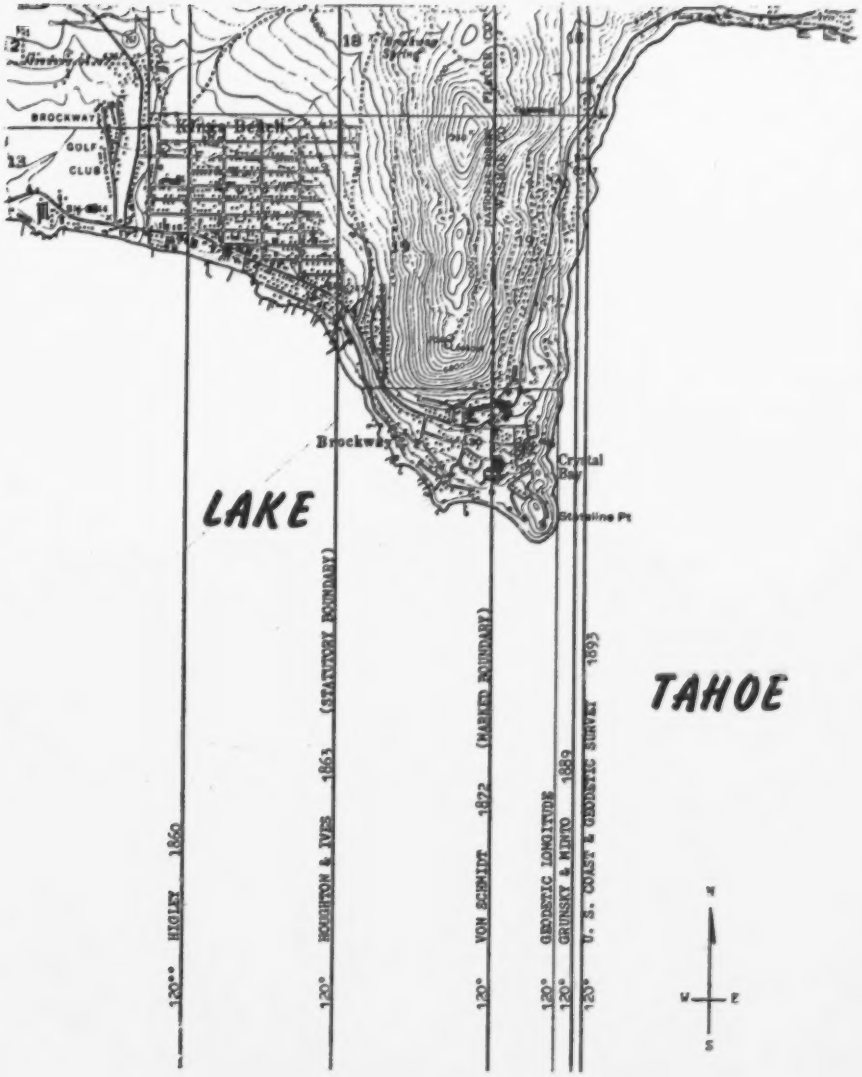
Counsel for Plaintiff, State of California

EXHIBIT 1 OF COMPLAINT

EXHIBIT 2 OF COMPLAINT



MOTION FILED
MAY - 2 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

Motion for Leave to File Amended Complaint and Amended Complaint

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

Motion for Leave to File Amended Complaint

The State of California, appearing through its Attorney General Evelle J. Younger, respectfully requests leave of the Court to file its amended complaint in the instant action submitted herewith.

STATEMENT IN SUPPORT OF MOTION

A. Modern Surveying Methods Are Capable of Locating Boundaries with Great Accuracy

The State of California, plaintiff, reiterates its plea that the "Von Schmidt" line from Lake Tahoe to the Oregon border should be adjudged the established boundary between California and Nevada based on the doctrine of acquiesced boundaries. However, in the event this Court should find that the "Von Schmidt" line is not the proper boundary, a feasible alternative in the form of resurvey

exists. Atlhough plaintiff believes the Court has inherent power to order a resurvey in this case in any event (*Oklahoma v. Texas* (1926) 272 U.S. 21), this motion for leave to file amended complaint is made so that California's prayer will set out the alternatives clearly before the Court.

In the course of discovery, historical research, and study of the theory and practice of boundary determination pursuant to this action, plaintiff has recently become apprised of the fact that within the last few years great strides have been made in the field of boundary determination. Advanced techniques of boundary determination which are available and which would permit a resurvey of unprecedented accuracy warrant consideration by the Court as an alternative to the relief prayed for by plaintiff in its complaint.

Plaintiff has alleged, on pages 9 and 10 of its motion for leave to file complaint, and in paragraph X of its complaint, that the line set by Von Schmidt in 1872 between the thirty-ninth and forty-second degrees north latitude has been questioned as to its accuracy in representing the location of the meridian of one hundred twenty degrees of longitude west of Greenwich. At the time of the filing of the complaint in this action, plaintiff was not fully aware of the potential impact that the latest technology could have in precisely locating geographical boundaries.

Although there are several modern techniques designed for or capable of locating points generally on the earth with remarkable precision, of particular note is a new system recently called to plaintiff's attention which has revolutionized the measuring of geographical boundaries and which is well suited to locating the boundary in question. This system is called ARIES (Astronomical Radio Interferometric Earth Surveying) and was developed by the California Institute of Technology's Jet Propulsion Laboratory in

conjunction with the National Aeronautics and Space Administration (NASA). Very simply, this system which is a Very-Long-Baseline Interferometry (VLBI) technique operates by measuring from two or more stations relative arrival times of radio signals transmitted by quasars and radio galaxies billions of light years away. Because ARIES is a radio astronomic technique and does not depend upon gravity as an earth reference, it is capable of making extremely accurate geographic determinations free of the major sources of error caused by the gravitational force, the wobble of the earth's axis, and the inaccuracy of time signals typically associated with traditional optical methods. (C. C. Counselman, III, *Very-Long-Baseline Interferometry Techniques Applied to Problems of Geodesy, Geophysics, Planetary Science, Astronomy, and General Relativity,* Proceedings of the IEEE (September 1973) vol. 61, No. 9, p. 1225; Peter F. MacDoran, *Radio Interferometry for International Study of the Earthquake Mechanism,* Acta Astronautica (Pergamon Press 1974) vol. 1, pp. 1427-1444.)

B. Leave to File an Amended Prayer Should Be Permitted in the Interests of Justice and a Full Consideration of the Merits

Plaintiff, by asserting this motion for leave of the Court to amend its complaint to include an alternative form of relief based on its recently acquired knowledge of current developments in the technology applicable to geographic boundary location, seeks to bring before the Court significant and relevant information which it believes is meritorious and in the interests of justice.

Rule 15, subdivision (a) of the Federal Rules of Civil Procedure provides as follows:

> "(a) Amendments. A party may amend his pleading once as a matter of course at any time before a

> responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." (Emphasis added.)

The courts have consistently carried out the express mandate of this rule by freely and liberally granting leave to amend pleadings for the purpose of bringing all appropriate issues and facts before the court in the interests of justice. (*Foman v. Davis* (1962) 371 U.S. 178; *Dombrovskis v. Murff* (S.D.N.Y 1959) 24 FRD 302; 3 Moore's Federal Practice (2d ed. 1974) par. 15.08; 7 Volz, West's Federal Practice Manual (2d ed. 1970) par. 7984; Wright, Federal Courts (3d ed. 1976) § 66.)

Moore, in his work cited above, sums up the state of the law on this point aptly and concisely as follows:

> "Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the merits, the courts have not been hesistant to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed." (3 Moore's, Federal Practice (2d ed. 1974) par. 15.08, pp. 875, 876.)

C. The Court Has Inherent Power to Order a Resurvey

The alternative prayer for relief which plaintiff is hereby seeking to include in its complaint is appropriate to this action. Where the location of an interstate boundary is in dispute and where there is insufficient evidence to invoke the principle of acquiescence, the Court has inherent power to order a resurvey. (*Oklahoma v. Texas, supra,* 272 U.S. 21.)

In the case of *Oklahoma v. Texas* the Court was deciding the location of the boundary between the states along the one hundredth meridian of longitude from the Red River to the parallel of 36° 30′ north latitude which constitutes the eastern boundary of the panhandle of Texas and the main western boundary of Oklahoma. Several surveys had been made of the one hundredth meridian between the years of 1859 and 1902. Oklahoma and the United States, as intervenor, contended that the proper boundary was that line derived from an 1859 survey on the basis of res judicata of a previous judgment. Oklahoma also asserted that line on the doctrine of acquiescence, and Texas maintained that the boundary should be a line running north from a monument set by the direction of Congress and approved by the Secretary of Interior established in 1902 which fell eastward of the 1859 line.

The Court rejected the contention of Oklahoma and the United States of res judicata because the previous judgment did not rule on the effect of the 1859 survey; it rejected the contention of Texas because Congress did not authorize the running of a line northward from the approved monument; and it rejected the contention of Oklahoma based on acquiescence because the essential element of exercise of jurisdiction acquiesced in for a long period of years was lacking. The Court held that the boundary

line was the true one hundredth meridian and ordered that the line be accurately located under the direction and approval of the Court.

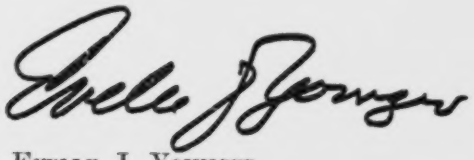
Therefore, when the location of an interstate boundary line is still in doubt after all the evidence has been considered, the Court has inherent power to order that a survey be made to determine the proper location of such boundary. Plaintiff requests the Court to consider this alternative in the present action.

CONCLUSION

Plaintiff therefore requests the Court, in the interests of justice, to grant plaintiff leave to file the amended complaint attached hereto.

DATED: April 25, 1978.

Respectfully submitted,



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Counsel for Plaintiff, State of California

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

Amended Complaint

The State of California appearing herein through Evelle J. Younger, its Attorney General, acting pursuant to the authority and powers vested in him by Article V, section 13 of the Constitution of California, institutes this original action against the State of Nevada.

I

The original jurisdiction of this Court is invoked under Article III, Section 2, clause 2 of the Constiution of the United States and 28 U.S.C. Section 1251.

II

The State of California was admitted to the Union of the United States of America by Act of Congress found in the United States Statutes at Large, vol. 9, p. 452. The act

approved the California Constitution of 1849 which provides in pertinent part:

> The boundary of the State of California shall be as follows: Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects with the thirty-ninth degree of north latitude. . . Article XII, Section 1.

An accurate representation of the placement of this boundary with respect to the two states is attached as Exhibit 1 and incorporated by reference herein.

III

The State of Nevada was admitted to the Union of the United States by Act of Congress and Presidential Proclamation. United States Statutes at Large, vol. 13, Ch. 36, p. 30; and Proclamation No. 22, 13 Stats. at Large, App. p. 63. The Act and Proclamation approved the Nevada Constitution, which in relevant part provides that the western boundary of Nevada shall be the eastern boundary of California and further provides that:

> "all such territory lying west of and adjoining the boundary line herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this state." Nevada Constitution, Article 14, section 1.

IV

Following border disputes that led to armed conflict, the State of California and the Territory of Nevada in 1863 agreed to survey and post the segment of the California-Nevada boundary north of Lake Tahoe to Oregon; i.e., the

one hundred and twentieth meridian between the forty-second and thirty-ninth north latitudes. The survey, which led to establishment of a line hereinafter referred to as the "Houghton-Ives" line, was conducted by California Surveyor General, J. F. Houghton, and the Commissioner for the Territory of Nevada, Butler Ives.

V

The "Houghton-Ives" line was adopted by the California Legislature in 1864 as the eastern boundary line of the State of California (Cal. Stats. 1864, Ch. 455, pp. 506-507, reenacted as California Government Code section 160 in 1943 Cal. Stats. 1943, Ch. 134, p. 896.) It was observed by the State of California from 1864 to 1872.

VI

The "Houghton-Ives" line was adopted in 1865 by the Nevada Legislature as the legal western boundary line of the State of Nevada. Nevada Stats. 1864-1865, Ch. 31, pp. 133-134, 347. It was observed by the State of Nevada from 1865 to 1872.

VII

In 1872 the United States Government through its General Land Office contracted with Allexey W. Von Schmidt to survey, post and monument the one hundred twentieth meridian between the forty-second and thirty-ninth degrees north latitude. This line, hereinafter referred to as the "Von Schmidt" line, was surveyed, posted and monumented. Its location varies from 3000 to 6000 feet east of the "Houghton-Ives" line. It has been recognized and observed by both states and their governmental subdivisions from 1872 to the present time in the provision of governmental services, in assessment and taxing practices,

and in the exercise of civil and criminal jurisdiction, and constitutes the lawful boundary between the states by acquiescence.

VIII

There is a controversy between the States of California and Nevada in that by statute, the State of Nevada asserts dominion and jurisdiction to territory over which the State of California has exercised dominion, jurisdiction and control for 105 years for all governmental purposes; such territory being the lands located in the area between the "Von Schmidt" and the "Houghton-Ives" lines. Said area is approximately 3000 feet wide at the north end of Lake Tahoe, and increases to 6000 feet wide further north. The State of Nevada thereby claims right, title or interest in said land adverse to the State of California.

IX

The State of California has, since 1872, continuously exercised jurisdiction in the said territory described in Paragraph VIII above, all without objection from the defendant State of Nevada. The incidents of jurisdiction exercised by said State of California include, but are not limited to, assessments, taxing, the provision of governmental services, and the exercise of police power. Nevada has acquiesced in California's exercise of dominion and jurisdiction, and California has therefore obtained title to the land in question.

X

The propriety of the "Von Schmidt" line has, from time to time since 1872, been questioned in the reports of governmental agencies. Said reports have caused uncertainty and the recurring possibility of challenges to the lawfulness of such boundary line on the part of both governmental agencies and private persons. A map of the north-

ern shore line of Lake Tahoe indicating the location of various lines as set forth above is attached as Exhibit 2 and incorporated by reference herein. However, neither the State of California nor the State of Nevada has demanded a resurvey of the "Von Schmidt" line with respect to the affected area, and both states have continuously observed said line since 1872.

XI

The statutory claim of Nevada and the questions raised concerning the boundary more particularly described in Paragraphs IX and X above have created, and will continue to create, uncertainty of titles, and may cause a multiplicity of actions involving the titles to individual parcels, challenges to assessments, the payment of taxes and the defense of criminal actions, and attempts to conduct businesses which may be unlawful in California. The claim and actions of the State of Nevada therefore cause, and will continue to cause, irreparable injury to the plaintiff, for which there is no adequate remedy at law.

WHEREFORE, PLAINTIFF PRAYS:

1. That a decree be entered adjudging the eastern boundary of California between the thirty-ninth and forty-second degrees north latitude to be the "Von Schmidt" line;

2. That a decree be entered adjudging that the State of Nevada has no right, title or interest to any such lands west of the "Von Schmidt" line; and perpetually enjoining the defendant from asserting any right, title or interest to said land or any part thereof, or from interfering with the possession of California in said land;

3. That this Court issue an interlocutory decree in aid of its jurisdiction prohibiting the State of Nevada, its officers, employees, agents, courts, agencies and political subdivisions from exercising any acts of jurisdiction in the

lands west of the "Von Schmidt" line during the pendency of this action;

4. That in the alternative, should the Court not adjudge the eastern boundary of California between the thirty-ninth and forty-second degrees north latitude to be the Von Schmidt line, a resurvey be ordered by the Court to determine the true location of the meridian of one hundred twenty degrees of longitude west from Greenwich between the thirty-ninth and forty-second degrees north latitude, and that a decree be entered adjudging the line determined by such court-ordered survey to be the eastern boundary of California between the thirty-ninth and forty-second degrees north latitude;

5. For plaintiff's costs of suit herein; and

6. For such other and further relief as may be proper.

DATED: April 25, 1978.

Respectfully submitted,

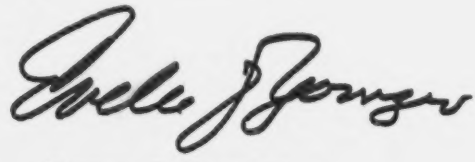

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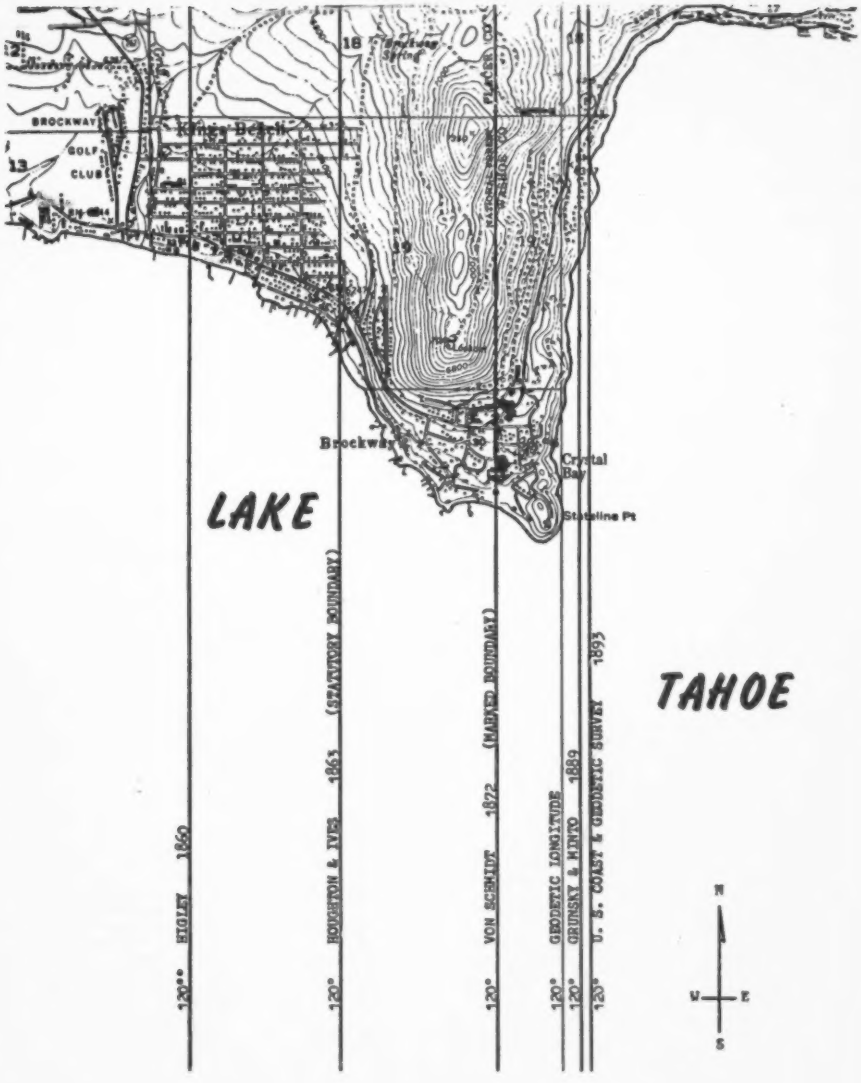
EXHIBIT 1 OF AMENDED COMPLAINT

EXHIBIT 2 OF AMENDED COMPLAINT



Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

STATE OF NEVADA'S RESPONSE TO CALIFORNIA'S MOTION FOR LEAVE TO FILE COMPLAINT

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1976

No. 73, Original

State of California,

Plaintiff,

v.

State of Nevada,

Defendant.

STATE OF NEVADA'S RESPONSE TO CALIFORNIA'S MOTION FOR LEAVE TO FILE COMPLAINT

I. THE STATE OF NEVADA DOES CLAIM THE 1863 SURVEY AS HER BOUNDARY WITH CALIFORNIA.

California is correct when she asserts that Nevada has claimed since 1865, and does presently claim by statute, that her westernmost boundary with California extends to the Houghton-Ives Line. As noted in California's Motion for Leave to File Complaint (pp. 4 and 5), this line was based on the survey jointly undertaken with California in 1863 to settle boundary differences culminating in the "Sagebrush War" (Honey Lake War).

Although the location of the boundary was jointly surveyed and deter-

mined by the states in 1863, the adoption of the survey was by the unilateral act of each state legislature in reliance on the consensus reached as to where the boundary was. This consensual arrangement, while not rising to the dignity of a compact between states as contemplated by Article I, Section 10, Clause 3, U. S. Constitution, was nonetheless a recognition by each state that each would observe the boundary surveyed in 1863.

II. THE MARKED BOUNDARY ALONG THE VON SCHMIDT SURVEY OF 1872-73 WAS FIXED SOLELY BY THE UNITED STATES.

California correctly states that the 1863 line was observed by both states until the Von Schmidt Line was set in 1873, and that since 1873, each state has exercised and continues to exercise political jurisdiction and sovereignty up to the Von Schmidt Line as presently marked on the ground.

The Von Schmidt survey resulted from the actions of Willis Drummond, Commissioner of the U. S. General Land Office, following his public proclamation during a visit to San Francisco, that the California-Nevada boundary had never been correctly surveyed and that he would seek a congressional appropriation to have the survey rectified.[1] On June 10, 1872, Congress provided "for a survey

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1/ Bancroft, History of the Pacific States, Vol. XXV, p. 156

of the eastern boundary of California ... lying north of the initial point in Lake Bigler (Tahoe) estimated to be 210 miles."[2]

The United States retained Von Schmidt to do the survey, and in the course of his survey, Von Schmidt physically relocated the 1863 boundary monuments to a new position 3102 feet east of the 1863 surveyed boundary at the north shore of Lake Tahoe and 4036 feet east of the 1863 boundary at Crystal Peak near Verdi, Nevada.[3]

Neither California nor Nevada ever requested or authorized the United States to remark and change their boundary as jointly fixed in 1863. Thus, Von Schmidt and the General Land Office did not survey California's eastern boundary as then established and posted, but instead proceeded without authorization from either state to relocate the boundary, relocate the 1863 monuments and changing them from "1863" to read "1873".[4]

2/ 17 Stat. 358

3/ Von Schmidt, Report of Survey 1873, U. S. Bureau of Land Management, Reno, Nevada

4/ C. H. Sinclair. The Oblique Boundary Line between California and Nevada, Appendix 3 to Sen. Doc. Vol. 6, No. 68, 56th Cong. 2d Sess., 1901, pp. 277, 278, 293, 295 and 348

California and Nevada have never recognized in law the 1872-73 Von Schmidt Line. To the present day, each state, as noted, recognizes by statute the 1863 surveyed boundary.

III. A CONTROVERSY DOES PRESENTLY EXIST BETWEEN CALIFORNIA AND NEVADA OVER THE LAND BETWEEN THE 1863 AND 1873 SURVEYS.

In 1943, the California Legislature reenacted the 1864 statute adopting the 1863 Houghton-Ives Line by codifying the same as Section 160 of the Government Code.[5] As recently as November 7, 1972, the People of California amended their Constitution to provide that California's boundaries are those described in the Constitution of 1849 "as modified pursuant to statute."[6] The People of California also deleted in 1972 a constitutional provision which empowered the Legislature to alter, change or redefine her boundaries in cooperation with any adjoining state.[7]

California's assertion that she exercises legal sovereignty and dominion to lands east of the 1863 Houghton-Ives Line and up to the Von Schmidt Line of 1873 is contrary to her own constitutional and statutory mandate, and therefore she is not empowered to assert sovereignty and dominion east of the 1863 line.

5/ Calif. Stats., 1943, Chapter 134

6/ Section 2 of Article 3

7/ Former Section 2 of Article 21

A controversy therefore exists between the two states as to whether California or Nevada is entitled to exercise sovereignty and dominion over the lands lying between the 1863 and 1873 surveyed lines.

IV. THE CONTROVERSY CANNOT BE RESOLVED BY COMPACT.

The preferred means of settling disputes between states by compact[8] is not available in the matter sub judice because the People of California, as noted above, have specifically withdrawn from their Legislature any power or authority to alter or redefine her boundaries by agreement with adjoining states.

California's recognition of her legal disability precluding resolution of the present dispute by legislative means is revealed by Assembly Concurrent Resolution No. 34 (Exhibit A to California's Motion), which contemplates resolution of the dispute by judicial means.

CONCLUSION

In view of the existing controversy between California and Nevada, and because there is involved herein not merely a suit to determine legal title to and ownership of the disputed area, but a larger question of governmental

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8/ See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104

authority and jurisdiction over that area, Nevada submits the case is an appropriate one for the exercise of original jurisdiction of the Court.[9] *Nevada therefore urges the Court to exercise its original jurisdiction.*

Respectfully submitted,

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Attorney General of Nevada

JAMES H. THOMPSON
Chief Deputy Attorney General

MICHAEL W. DYER
Deputy Attorney General

HARRY W. SWAINSTON
Deputy Attorney General

Counsel for State of Nevada

9/ Precedent for a Response agreeing that a case is an appropriate one for the exercise of original jurisdiction is the response by the United States in Utah v. United States, 387 U.S. 902.

CERTIFICATE OF SERVICE

I, ROBERT F. LIST, Attorney General of Nevada, hereby certify that on the 16th day of May, 1977, I mailed by first class mail, postage prepaid, three copies to each of the following:

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State Capitol Building
Sacramento, California 95814

Evelle J. Younger
Attorney General of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

ROBERT F. LIST
Attorney General of Nevada

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

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STATE OF NEVADA,

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Chief Deputy Attorney General

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

NO. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

ANSWER

COMES NOW, the State of Nevada and by and through its Attorney General, Robert List, answers the complaint of the State of California in this original action as follows:

I.

The State of Nevada admits Paragraph I of the complaint.

II.

In answer to Paragraph II of the complaint, the State of Nevada admits that the description of the boundary of the State of California was in 1849 as set forth in the complaint. However, the State of Nevada denies that the description of the boundary of the State of California is presently described as set forth in Paragraph II of the complaint. The State of Nevada further

denies that Exhibit 1 is an accurate representation of the placement of the boundary described in Paragraph II of the complaint and demands strict proof thereof.

III.

In answer to Paragraph III of the complaint, the State of Nevada admits that she was admitted to this Union of United States by Act of Congress and Presidential Proclamation as stated in Paragraph III of the complaint. The State of Nevada further admits that the language of Article Fourteen, Section 1 of the Nevada Constitution which is quoted in Paragraph III of the complaint is contained in said Article Fourteen, Section 1 of the Nevada Constitution. However, the State of Nevada denies that the language quoted in Paragraph III of the complaint is complete and alleges that the entire description of Nevada's boundaries is as follows:

> The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty eighth degree of Longitude West from Washington with the Thirty Seventh degree of North latitude; Thence due West along said thirty seventh degree of North latitude to the eastern boundary line of the State of California; thence in a North Westerly direction along said Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington; Thence North along said forty third degree of West Longitude, and said Eastern boundary line of the

State of California to the forty second degree of North Latitude; Thence due East along the said forty second degree of North Latitude to a point formed by its intersection with the aforesaid thirty eighth degree of Longitude west from Washington; Thence due South down said thirty eighth degree of West Longitude to the place of beginning. And whensoever Congress shall authorize the addition to the Territory or State of Nevada of any portion of the territory on the Easterly border of the foregoing defined limits, not exceeding in extent one degree of Longitude, the same shall thereupon be embraced within, and become a part of this State. And furthermore Provided, that all such territory, lying West of and adjoining the boundary line herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this state. Nevada Constitution, Article Fourteen, Section 1.

IV.

The State of Nevada admits all portions of Paragraph IV of the complaint with the exception of the statement that the Territory of Nevada in 1863 agreed to survey and post the 120th Meridian as the boundary between the two states. The State of Nevada specifically alleges that even if the survey was described in

terms of the 120th Meridian, such descriptions were used and agreed upon only as a result of a mistake of fact resulting from the belief that the 43rd degree west of Washington was the same as the 120th degree west of Greenwich.

V.

In answer to Paragraph V of the complaint, the State of Nevada admits that the "Houghton-Ives" line was adopted by the California legislature in 1864 as the eastern boundary of the State of California and the said line was reenacted in 1943 by the California legislature. Nevada alleges that the People of California as recently as November 7, 1972, adopted the 1863 boundary line by amending their Constitution fixing California's boundary to be as described in the 1849 Constitution except "as modified pursuant to statute." The State of Nevada denies that the State of California observed the "Houghton-Ives" line from 1864 to 1872 based upon lack of information and belief and demands strict proof thereof.

VI.

In answer to Paragraph VI of the complaint, the State of Nevada admits that the "Houghton-Ives" line was adopted by the State of Nevada in 1865 as the legal western boundary of Nevada. However, the State of Nevada points out that the correct citation of such adoption is Statutes of Nevada 1864 - 1865, Ch. 31, pp. 133-134, 379. The State of Nevada admits that said line was observed by the State of Nevada from 1865 to 1872.

VII.

In answer to Paragraph VII of the complaint, the State of Nevada admits that in 1872 the United States Government through its general land office entered into a contract with one Allexey W. Von Schmidt. However, the State of Nevada denies that the purpose of the referenced contract was to survey, post and monument the 120th Meridian between the 42nd and 39th degrees of north latitude and alleges that the purpose was rather to survey, post and monument the then existing boundary between the states of California and Nevada. The State of Nevada specifically alleges that if the purpose of the contract between the United States and Allexey W. Von Schmidt was other than to survey, post and monument the then existing boundary between the States of California and Nevada the contract was an illegal and ultra vires contract and any action taken pursuant thereto was without legal efficacy. The State of Nevada admits that a line known as the "Von Schmidt" line was surveyed, posted and monumented. The State of Nevada further admits that the "Von Schmidt" line varies in location from the "Houghton-Ives" line. However, the State of Nevada denies that the variation is from 3000 to 6000 feet as alleged in Paragraph VII of the complaint for lack of information and belief and demands strict proof thereof. The State of Nevada admits that since 1873 both states have exercised and continue to exercise political jurisdiction and sovereignty up to the "Von Schmidt" line as presently marked on the ground. The State of Nevada denies that the "Von Schmidt" line constitutes the lawful boundary between the states by acquiescence.

VIII.

In answer to Paragraph VIII of the complaint, the State of Nevada admits that a controversy exists between the states of California and Nevada as alleged in Paragraph VIII of the complaint. However, the State of Nevada lacks sufficient information and belief to form an answer as to the exact width of the area in dispute and therefore denies that said area is approximately 3000 feet wide at the north end of Lake Tahoe and increases to 6000 feet wide and demands strict proof thereof.

IX.

In answer to Paragraph IX of the complaint, the State of Nevada admits that the State of California has exercised jurisdiction to the "Von Schmidt" line as presently marked on the ground since 1873. The State of Nevada denies that the State of California has now or in the past obtained dominion in the lands in question. The State of Nevada further denies she has acquiesced in California's exercise of sovereignty and jurisdiction or that California has obtained title to the land in question.

X.

The State of Nevada admits the majority of Paragraph X of the complaint. However, the State of Nevada takes exception to Exhibit 2 referenced in Paragraph X in that Paragraph X, in the words of the complaint, indicates "the location of various lines". The State of Nevada alleges that only two lines are in contention, those being the "Houghton-Ives" line and the "Von Schmidt" line. The State of Nevada has attached as Exhibit A to her answer a

map showing a portion of the area in dispute at North Lake Tahoe.

XI.

The State of Nevada does not construe Paragraph XI of the complaint as requiring an answer. However, to the extent that an answer should be required, the State of Nevada denies the allegations set forth in Paragraph XI and demands strict proof thereof.

WHEREFORE, defendant prays:

1. That the Court enter a decree adjudging the eastern boundary of California between the 39th and 42nd degrees north latitude to be the "Houghton-Ives" line;

2. That a decree be entered adjudging that the State of California has no right, title or interest to any lands between the "Houghton-Ives" line and the "Von Schmidt" line and perpetually enjoining the State of California from asserting any rights to said land or any part thereof or from interfering with the possession of the State of Nevada therein;

3. That the State of Nevada be awarded costs of suit and attorneys' fees; and

4. For such other and further relief as the Court may deem appropriate.

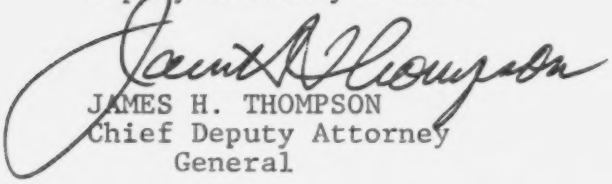
DATED this 17th day of August, 1977.

Respectfully submitted,

ROBERT F. LIST
Attorney General of
Nevada

MICHAEL W. DYER
Deputy Attorney General

HARRY W. SWAINSTON
Deputy Attorney General



JAMES H. THOMPSON
Chief Deputy Attorney
General

Counsel for State of
Nevada

CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General of Nevada, hereby certify that on the 24th day of August, 1977, I mailed by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.
Governor of California
State Capitol Building
Sacramento, California 95814

Evelle J. Younger
Attorney General of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

JAMES H. THOMPSON
Chief Deputy Attorney General

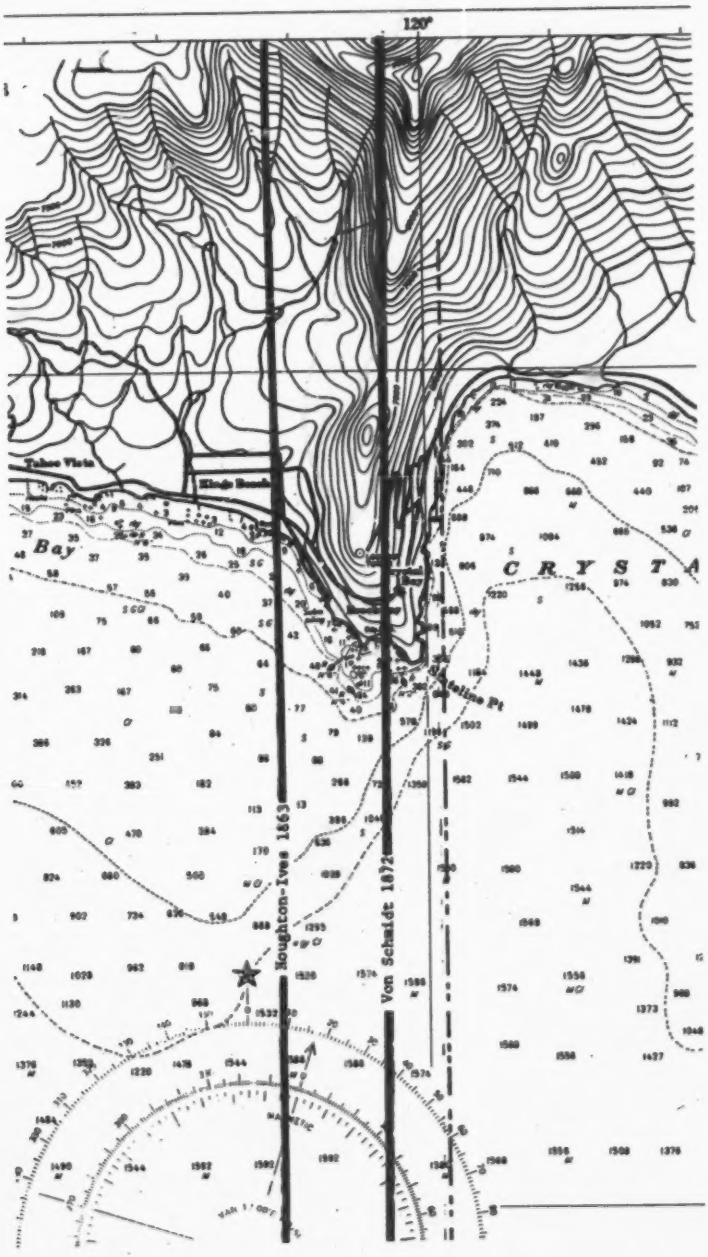


EXHIBIT "A" TO ANSWER

MOTION FILED

APR 24 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDED ANSWER AND COUNTERCLAIM

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDING PREVIOUS ANSWER

COMES NOW the defendant State of Nevada and moves the Court for an

Order granting leave to file an Amended Answer amending defendant State's previous Answer and setting forth counterclaim. This motion is based upon the following grounds:

1. The counterclaim sought to be asserted is compulsory in nature as it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Federal Rules of Civil Procedure, Rule 13(a).

2. The counterclaim is based upon facts unknown at the time of defendant's answer and was therefore omitted. Justice requires the omitted counterclaim be allowed to be raised by amendment. Federal Rules of Civil Procedure, Rule 13(f).

3. The counterclaim must be raised in this proceeding or not at all under principles of res judicata.

4. The interests of justice require that the facts and the law relative to the entire boundary between Nevada and California be fully adjudicated in this proceeding. Federal Rules of Civil Procedure, Rule 1.

5. Facts discovered during the pendency of this proceeding compel the State of Nevada to seek to amend the Answer to set forth her present position relative to allegations of the Complaint.

This motion is further based upon all of the pleadings, papers and records filed to date in this proceeding and upon the annexed memorandum of points and authorities and the annexed proposed amended answer and counterclaim.

Respectfully submitted,

ROBERT LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By James H. Thompson
James H. Thompson
Chief Deputy Attorney
General

CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General of Nevada, hereby certify that on the 21st day of April, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.
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Sacramento, California 95814

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James H. Thompson
Chief Deputy Attorney General

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

NO. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA

Defendant.

MEMORANDUM OF

POINTS AND AUTHORITIES

I. THE COUNTERCLAIM SOUGHT TO BE ASSERTED IS COMPULSORY

Federal Rules of Civil Procedure, Rule 13(a) provides in pertinent part:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ."

A claim which arises out of the transaction

or occurrence that is the subject matter of the opposing party's claim must be pleaded or it is barred. This Court construed the compulsory counterclaim provision of Equity Rule 30 which required a counterclaim "arising out of the transaction which is the subject matter of the suit" in Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926). There the Court recognized that:

> "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

In Moore, one of the links in the chain which constituted the basis of the plaintiff's cause of action was the refusal of the defendant to furnish quotations. It was also an important part of the transaction constituting the subject matter of the counterclaim and therefore the Court held that the counterclaim was compulsory.

In this proceeding Nevada's counterclaim arises out of essentially the same facts which the State of California relies upon as the basis of her complaint. "That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter." Id.

Rule 13(a) is broader in scope than Equity Rule 30 as it is stated in terms of "transactions or occurrences" rather than transactions only. Professor Moore in 3 Moore's Federal Practice ¶13.13

opines that the "courts should give the phrase 'transaction or occurrence that is the subject matter' of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits." See Southern Construction Company v. Pickard, 371 U.S. 57, 60 (1962).

The State of Nevada's counterclaim arises out of transactions and occurrences which are logically related to those claims that the State of California has asserted in that it involves the operative facts surrounding the several surveys.

II. JUSTICE REQUIRES THAT THE COUNTERCLAIM SOUGHT TO BE ASSERTED BE RAISED BY AMENDMENT OF ANSWER

Federal Rules of Civil Procedure, Rule 13(b) provides:

> "OMITTED COUNTERCLAIM. When a pleader fails to set up a counterclaim through inadvertance, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

The State of Nevada omitted the counterclaim because she was unaware of the existence of certain facts at the time of the Answer. The border controversy raised by California's Complaint involves complex historical facts which counsel for Nevada was able to determine only through extensive, in depth research. Justice requires that the State of Nevada be permitted to assert the omitted counterclaim based upon the

product of such research. The interjection of the counterclaim will not upset in any manner the orderly presentation of issues already before the Court.

Professor Moore suggests at 3 Moore's Federal Practice ¶13.33 that "inasmuch as a party could later be met successfully with a plea of res judicata in a suit on a claim within subdivision (a) which he had failed to plead, the courts should be very liberal in allowing amendments to include compulsory counterclaims..."

III. THE COUNTERCLAIM MUST BE RAISED IN THIS PROCEEDING OR NOT AT ALL UNDER PRINCIPLES OF RES JUDICATA

The basic elements of res judicata are a court of competent jurisdiction; final prior judgment on the merits; same parties or privies; and same cause of action. Blonder Tongue Lab. Inc. v. University of Ill. Foundation, 402 U.S. 313, 323-24, (1971); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac., 94 U.S. 351, 352 (1877).

In any future litigation between California and Nevada relative to their common boundary the only possibility that the lawsuit would not be barred by the doctrine of res judicata is that the cause of action involved in the subsequent litigation might be deemed different so as not to be barred by the judgment in this proceeding. Broad construction by the courts of "cause of action" renders this possibility unlikely, however.

A widely used test for comparing causes of action is whether the primary right and duty, and the delict or wrong, are the same in each action or, to put it another way, whether the same right has been infringed by the same wrong. Baltimore S.A. Co. v. Phillips, 274 U.S. 316, 321 (1927); Seaboard Coastline Railroad Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969); Englehardt v. Bell & Howell Company, 327 F.2d 30, 32 (8th Cir. 1964). In the instant case the primary right is dominion and sovereignty over each State's territory. The correlative duty is the obligation of the other State to respect such dominion and sovereignty. The delict is the wrongful assertion by one State of dominion and sovereignty over lands of the other. A subsequent cause of action involving the common boundary would necessarily involve the same primary right, duty and delict or wrong.

This Court stated in Baltimore S.S. v. Phillips, supra, at 321:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."

A judgment's finality applies to facts which might have been pleaded with reference to the same events as well as to those actually pleaded and which became final by adjudication. Lester v. National Broadcasting Company, Inc., 217 F.2d 399, 400 (9th Cir. 1955), cert. denied 348 U.S. 954 (1955).

The right which each State seeks to establish by this proceeding is the proper location of the common boundary

between them. The State of Nevada has recently discovered historical facts which are not only relevant to issues concerning boundary lines heretofore presented but support other boundary lines which the State wishes to assert. The State submits that the right to a settled boundary is a single cause of action within which all relevant facts must be pleaded to support whatever grounds for relief there may be.

This original proceeding is in the nature of a quiet title action. Furthermore, the claims sought to be raised by the State of Nevada in her counterclaim involve territory that is adjoining the territory which is the subject matter of the State of California's claims. It seems appropriate, therefore, that all property which may be in the zone of dispute be drawn into this proceeding so as to conclusively quiet title to all border lands in controversy.

Mr. Justice Holmes stated in United States v. California and Oregon Land Co., 192 U.S. 355, 358 (1904):

> "But the whole tendency of our decision is to require the plaintiff to try his whole cause of action and his whole case at one time."

In that case this Court looked to the intent of a previous quiet title suit brought by the United States and determined that its purpose was to conclusively quiet title or otherwise terminate the claims to the land in question. "All claimants of any interest were at liberty to intervene and to have any other question affecting

the title settled..." 192 U.S. at 359. Thus, the Court recognized that defendants as well as plaintiffs are barred by the same principle.

In Northern Pacific Railway Company v. Slaght, 205 U.S. 122, 131-132 (1907), this Court recognized that:

> "Although there may be several different claims for the same thing, there can only be one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided; for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all of his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.
>
> ****
>
> "The doctrine has illustrations in suits to quiet title. It was decided in Lessees Of Parrish v. Ferris, et al., 2 Black, 606, that the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words it determines the merits of the plaintiff's title as well as that

of the defendant."

The res in this proceeding is the territory which lies on the common boundary of the States of Nevada and California and contiguous to each. It belongs to either one State or the other. The purpose of the counterclaim which the State of Nevada is attempting to assert is to present for adjudication the common boundary issues for all time.

A party is required to try his whole cause of action and his whole case at one time; he cannot split up his claim and he cannot divide the grounds for his recovery. See United States v. California & Oregon Land Co., supra at 358; see also Baltimore S.S. Co. v. Phillips, supra; Northern Pacific R.R. Co. v. Slaght, supra; Cromwell v. County of Sac., supra, at 358; Hatchitt v. United States, 158 F.2d 754, 755 (9th Cir. 1946); McCarthy v. Noren, 370 F.2d 845, 847 (9th Cir. 1966); F. L. Mendez & Co. v. General Motors Co., 161 F.2d 695, 698 (7th Cir. 1947), cert. denied, 332 U.S. 810 (1947). All of these cases conclude that the second suit is barred by res judicata when it is based upon a demand that a party could have pleaded and litigated in a prior action.

The courts, in invoking res judicata, have repeatedly emphasized that the doctrine applies not only in respect to every matter which was actually pleaded or litigated in the prior action, but also as to every matter which could have been presented in the prior action. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375, 378 (1940); Baltimore S. S. Co. v. Phillips, supra; Boys Town U.S.A. v. World Church, 349 F.2d 576, 578

(9th Cir. 1965), cert. denied, 383 U.S. 910 (1966); Hatchitt v. United States, supra; Rhodes v. Jones, 351 F.2d 884, 886-887 (8th Cir. 1965), cert. denied, 383 U.S. 919 (1966). Since the judgment in the present case will have the effect of extinguishing the cause of action, it will be conclusive in any later suit, not only on those matters which actually were litigated, but on all matters which could have been litigated in this proceeding. Harrison v. Bloomfield Bldg. Indus., 435 F.2d 1192 (6th Cir. 1970).

This Court noted in Blonder Tongue Lab., Inc. v. University of Ill. Foundation, supra, at 328 that:

> "[M]ore than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."

The policy of the Federal Rules of Civil Procedure to encourage joinder of claims and counterclaims and which emphasizes the economics of sound judicial administration by cutting down multiplicity of suits fully support the State of Nevada's motion to amend her answer setting forth whatever counterclaims she has with respect to issues relating to her common border with California.

IV. THE INTERESTS OF JUSTICE SUPPORT NEVADA'S MOTION TO AMEND HER ANSWER

Federal Rule of Civil Procedure, Rule 15(a) provides that where a responsive

pleading has been served:

> "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The State of Nevada seeks to amend her answer to make more definite certain admissions and denials of allegations contained in California's Complaint based upon newly discovered facts.

In Forman v. Davis, 371 U.S. 178, 182 (1962) this Court reaffirmed its position that "the purpose of pleading is to facilitate a proper decision on the merits." In this respect the Court noted that:

> "The Rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1."

This Court further noted at 182 that:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded."

In addition to the inclusion of a compulsory counterclaim, Nevada's efforts to amend are asserted in a good faith effort to admit those facts which it now believes to be true. Nevada submits that leave to amend in such manner should be "freely given".

Respectfully submitted,

ROBERT LIST, Attorney
General of Nevada
JAMES H. THOMPSON, Chief
Deputy Attorney General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By James H. Thompson
James H. Thompson
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Capitol Complex
Carson City, Nevada 89710

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Counsel for Defendant
State of Nevada

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

NO. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

AMENDED ANSWER AND COUNTERCLAIM

COMES NOW, the State of Nevada by and through her Attorney General, Robert List, and answers the complaint of the State of California in this original proceeding as follows:

I.

The State of Nevada admits Pararaph I of the complaint.

II.

In answer to Paragraph II of the complaint, the State of Nevada admits that the description of the boundary of the State of California was described in 1849 as set forth in the complaint. However, the

State of Nevada denies that the description of the boundary of the State of California is presently described as set forth in Paragraph II of the complaint. The State of Nevada further denies that Exhibit 1 is an accurate representation of the placement of the boundary described in Paragraph II of the complaint and demands strict proof thereof.

III.

In answer to Paragraph III of the complaint, the State of Nevada admits that she was admitted to this Union of United States by Act of Congress and Presidential Proclamation as stated in Paragraph III of the complaint. The State of Nevada further admits that the language of Article Fourteen, Section 1 of the Nevada Constitution which is quoted in Paragraph III of the complaint is contained in said Article Fourteen, Section 1 of the Nevada Constitution. However, the State of Nevada denies that the language quoted in Paragraph III of the complaint is complete and alleges that the entire description of Nevada's boundaries is as follows:

> The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty eighth degree of Longitude West from Washington with the Thirty Seventh degree of North latitude; Thence due West along said thirty seventh

degree of North latitude to the eastern boundary line of the State of California; thence in a North Westerly direction along said Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington; Thence North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California to the forty second degree of North Latitude; Thence due East along the said forty second degree of North Latitude to a point formed by its intersection with the aforesaid thirty eighth degree of Longitude west from Washington; Thence due South down said thirty eighth degree of West Longitude to the place of beginning. And whensoever Congress shall authorize the addition to the Territory or State of Nevada of any portion of the territory on the Easterly border of the foregoing defined limits, not exceeding in extent one degree of Longitude, the same shall thereupon be embraced within, and become a part of this State. And furthermore Provided, that all such territory, lying West of and adjoining the boundary line

> herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this State. Nevada Constitution, Article Fourteen, Section 1.

IV.

The State of Nevada admits all portions of Paragraph IV of the complaint.

V.

The State of Nevada admits all portions of Paragraph V of the Complaint and alleges that the People of California as recently as November 7, 1972, adopted the 1863 "Houghton-Ives" boundary line by amending their constitution fixing California's boundary to be as described in the 1849 Constitution except "as modified pursuant to statute."

VI.

In answer to Paragraph VI of the complaint, the State of Nevada admits that the "Houghton-Ives" line was adopted by the legislature of the State of Nevada in 1865 as the legal western boundary of Nevada, notwithstanding the fact that Nevada's Constitution described her western boundary along the 43rd Meridian West of Washington. The correct citation of such adoption is

Statutes of Nevada 1864-1865, Ch. 31, pp. 133-134, 379. The State of Nevada admits that said line was observed by the State of Nevada from 1865 to 1872.

VII.

In answer to Paragraph VII of the complaint, the State of Nevada admits that in 1872 the United States Government through its General Land Office entered into a contract with Allexey W. Von Schmidt. The State of Nevada admits that the purpose of the contract between the United States and Allexey W. Von Schmidt was to survey, post and monument the One Hundred Twentieth Meridian between the Forty Second and Thirty Ninth degrees of North latitude. The State of Nevada alleges that the survey was to begin at the point of intersection of the Forty Second degree of North latitude with the One Hundred Twentieth Meridian as established by U. S. Surveyor and Astronomer Daniel G. Major in 1868, and proceed on a true meridian south to the intersection of the Thirty Ninth degree of North latitude with the One Hundred Twentieth Meridian. The State of Nevada admits that a line known as the "Von Schmidt" line was surveyed, posted and monumented, and admits that the "Von Schmidt" line varies in location from the "Houghton-Ives" line. However, the State of Nevada denies that the variation is from 3000 to 6000 feet as alleged in Paragraph VII of the complaint for lack of information and

belief and demands strict proof thereof. The State of Nevada admits that since 1873 both states have exercised and continue to exercise political jurisdiction and sovereignty up to the "Von Schmidt" line as presently marked on the ground. The State of Nevada denies that the "Von Schmidt" line constitutes the lawful boundary between the states by acquiescence.

VIII.

In answer to Paragraph VIII of the complaint, the State of Nevada admits that a controversy exists between the States of California and Nevada as alleged in Paragraph VIII of the complaint. However, the State of Nevada lacks sufficient information and belief to form an answer as to the exact width of the area in dispute and therefore denies that said area is approximately 3000 feet wide at the north end of Lake Tahoe and increases to 6000 feet wide and demands strict proof thereof. The State of Nevada specifically denies that the area between the 1863 Houghton-Ives line and the 1872 Von Schmidt line is the only area in dispute. The areas in dispute as they relate to the Lake Tahoe area are shown on Exhibits "A" and "B" attached to this Amended Answer.

IX.

In answer to Paragraph IX of the complaint, the State of Nevada

admits that the State of California has exercised jurisdiction to the "Von Schmidt" line as presently marked on the ground since 1873. The State of Nevada denies that the State of California has now or in the past obtained dominion in the lands in question. The State of Nevada further denies she has acquiesced in California's exercise of sovereignty and jurisdiction or that California has obtained title to the land in question.

X.

The State of Nevada admits that the "Von Schmidt" line has, from time to time since 1872, been questioned in the reports of governmental agencies and that such reports have caused uncertainty and the recurring possibility of challenges to the lawfulness of such boundary line. The State of Nevada admits that Exhibit 2 does show some lines which are in contention, but shows others which are not in contention. Additionally, other lines are in contention which are not depicted. The State of Nevada admits that neither State has demanded a resurvey of the "Von Schmidt" line north of its intersection with the Thirty Ninth degree of North Latitude.

XI.

The State of Nevada does not construe Paragraph XI of the complaint

as requiring an answer. However, to the extent that an answer should be required, the State of Nevada denies the allegations set forth in Paragraph XI and demands strict proof thereof.

COUNTERCLAIM

COMES NOW the defendant State of Nevada and pursuant to Federal Rule of Civil Procedure 13(a), and counterclaims against the plaintiff State of California as follows:

COUNT I

CLAIM FOR HOUGHTON-B. IVES BOUNDARY

I.

The boundary line between the States of Nevada and California was established by a survey conducted pursuant to agreement of the State of California and the Territory of Nevada in 1863. Said survey was conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner appointed by the Territory of Nevada. The "Houghton-B. Ives" line was adopted by the California Legislature in 1864 as the Eastern boundary line of the State of California (Cal. Stats. 1864, Chap. 455, pp. 506-507, reenacted as California Government Code Section 160 in 1943 Cal. Stats. 1943, Chap. 134, p. 896). The Legislature of the State

of Nevada adopted the "Houghton-B. Ives" line as the legal Western boundary line of the State of Nevada in 1865. Statutes of Nevada 1864-1865, Chap. 31, pp. 133-134, 379.

II.

The "Houghton-B. Ives" line was surveyed pursuant to agreement of the Territory of Nevada and the State of California to set the boundary line on the One Hundred Twentieth Meridian between the Forty Second degree of North Latitude and the Thirty Ninth degree of North Latitude and southeasterly on a line between the intersection of the One Hundred Twentieth Meridian and the Thirty Ninth degree of North Latitude to the point established by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

III.

The "Houghton-B. Ives" line was surveyed and monumented between its intersection with the Thirty Ninth degree of North Latitude and its intersection with the Forty Second degree of North Latitude and for approximately one hundred miles Southeasterly on a line directed from the point of intersection with the Thirty Ninth degree of North Latitude to the intersection of the Thirty Fifth degree of North Latitude with the Colorado River as that point was established in 1861 by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, pursuant to Act

of Congress of May 26, 1860. (See Exhibit C)

IV.

One hundred years later, in 1961, Congress gave its consent, 75 Stat. 93, to a Compact between Arizona and Nevada defining a portion of the common boundary on the Colorado River beginning at the point where the Nevada-California state line intersects the Thirty Fifth degree of North Latitude. The Arizona-Nevada boundary compact established the point of said intersection with the Thirty Fifth degree North Latitude at the Colorado River. In 1966 Congress gave its consent, 80 Stat. 340, to a Compact between Arizona and California defining their common boundary from the intersection of the boundary line common to California-Nevada and the center line of the channel in the Colorado River as constructed by the U. S. Bureau of Reclamation. The compact expressly recognizes the said point of intersection of the Thirty Fifth degree North Latitude with the Colorado River channel as being common to the boundaries of Arizona, California and Nevada. Thus, the point of intersection of the Thirty Fifth degree of North Latitude with the Colorado River was conclusively established as being the terminal point of the oblique boundary to which the Houghton-B. Ives boundary should be extended.

V.

Under the 1872 contract with the United States alleged in Paragraph VII of the Answer, Allexey W. Von Schmidt conducted

a survey of the eastern boundary of California between its intersection with the Forty Second and Thirty Ninth degrees of North Latitude and from the point of intersection of the One Hundred Twentieth Meridian and the Thirty Ninth Degree of North Latitude on a Southeasterly line to the intersection of the Thirty Fifth degree of North Latitude and the Colorado River. In conducting said survey Allexey W. Von Schmidt, who was acting as an agent of the United States Government, physically moved the boundary between the State of California and the State of Nevada Easterly along its entire length. (See Exhibit D)

VI.

The authorization by Congress of the Von Schmidt survey was in excess of the powers granted to Congress by Article One, Section 8 of the United States Constitution and therefore in violation of the Tenth Amendment to the United States Constitution in that the United States Government purported to take from the State of Nevada and add to the State of California in excess of six hundred square miles. The "Von Schmidt" survey is thus an unconstitutional survey and a nullity from its inception.

VII.

The action of the United States Government by and through its agent Allexey W. Von Schmidt in physically moving the boundary of the State of Nevada without the prior and express consent of the State of Nevada was in violation of Article Four,

Section 3 of the United States Constitution and is therefore unconstitutional.

COUNT II.

ALTERNATIVE CLAIM FOR BOUNDARY FROM MAJOR'S CORNER TO THE COLORADO RIVER

VIII.

The Counterclaimant State of Nevada alleges and incorporates Count I of the Counterclaim as though the same was fully set forth herein.

IX.

Alternatively, if the "Houghton-B. Ives" line did not establish the boundary between Nevada and California, then the boundary between Nevada and California was conclusively established when the North-eastern corner of California was set and monumented in 1868 by Daniel G. Major, U. S. Surveyor and Astronomer, under contract with the United States Government, pursuant to the Act of Congress of March 2, 1867, 14 Stat. 465, at the intersection of the One Hundred Twentieth Meridian with the Forty Second degree of North Latitude. The monument set by Major is standing intact at the present date.

X.

Upon Major's monumenting the Northeast corner of California, which is

the beginning point of California's constitutional boundary, the landmass of the States of California and Nevada with respect to their common boundary was defined and could be connected on the ground by following the description contained in the Constitution of the State of California. That is, by proceeding due South on a true meridian from the corner established by Daniel G. Major; determining where said true meridian South intersected with the Thirty Ninth degree of North Latitude; and at such point taking a line southeasterly to the point established by Lieutenant J. C. Ives at the intersection of the Thirty Fifth degree of North Latitude in the Colorado River. (See Exhibit D)

XI.

The common border of California with Nevada having thus been fixed with the establishment of Major's corner, the action of the United States Government, through its agent Allexey W. Von Schmidt, in physically moving the Northeast corner of the State of California (being also the Northwest corner of the State of Nevada) to the East and then running and monumenting the entire boundary of California and Nevada on the basis of the "new" Northeast corner of California, thereby moving the entire boundary eastward, was violative of Article Four, Section 3 of the United States Constitution and the Tenth Amendment to the United States Constitution in that by such action the United States purported to take territory of the State of Nevada and attach the same to the State of California. (See Exhibit E)

COUNT III

ALTERNATIVE CLAIM FOR THE "VON SCHMIDT" BOUNDARY IN ITS ENTIRETY

XII

Counterclaimant State of Nevada alleges and incorporates Counts I and II of the counterclaim as though the same were fully set forth herein.

XIII.

Alternatively, if neither the "Houghton-B. Ives" boundary nor the boundary established by the corner set by Daniel G. Major in 1868 constitute the boundary between the States of California and Nevada, then the boundary was first established by Allexey W. Von Schmidt in 1872-1874.

XIV.

During the period 1893-1899, the United States Government, at the request of the representatives of the State of California and following correspondence with the Governor of California, undertook a resurvey of and then physically moved the oblique portion of the "Von Schmidt" line. Said action was taken without the prior and express consent of the State of Nevada. (See Exhibit F)

XV.

The action of the United States Government in physically moving the

"oblique boundary" of Nevada and California was in violation of Article Four, Section 3 of the United States Constitution and the Tenth Amendment thereto, in that the United States Government purported to take territory of Nevada and attach the same to California.

WHEREFORE, COUNTERCLAIMANT STATE OF NEVADA PRAYS AS FOLLOWS:

1. That the boundary between the State of Nevada and the State of California be declared to be the 1863 "Houghton-B. Ives" line from its intersection with the Forty Second degree of North Latitude to the intersection with the Thirty Ninth degree of North Latitude; thence along the line marked on the ground by the "Houghton-B. Ives" survey in 1863 to the terminal point thereof; thence continuing on a line to the point established by the 1961 -1966 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

2. If the Court should determine that the 1863 "Houghton-B. Ives" line is not the legal boundary, that the boundary between the State of Nevada and the State of California be declared to be a line established by running a true Meridian South from the Northeast corner of the State of California as established by Daniel G. Major in 1868 to said true Meridian's intersection with the Thirty Ninth degree of North Latitude and thence on a line to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude in the Colorado River.

3. If neither of the two lines prayed for above be determined to be the legal boundary, that the boundary between the State of Nevada and the State of California be held to be the entire "Von Schmidt" line from its beginning at the Forty Second degree of north latitude to its termination at the Colorado River; thence extending easterly to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

4. For costs incurred by defendant and counterclaimant herein; and

5. For such other and further relief as the Court may deem proper.

Dated this 21st day of April, 1978.

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Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
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Capitol Complex
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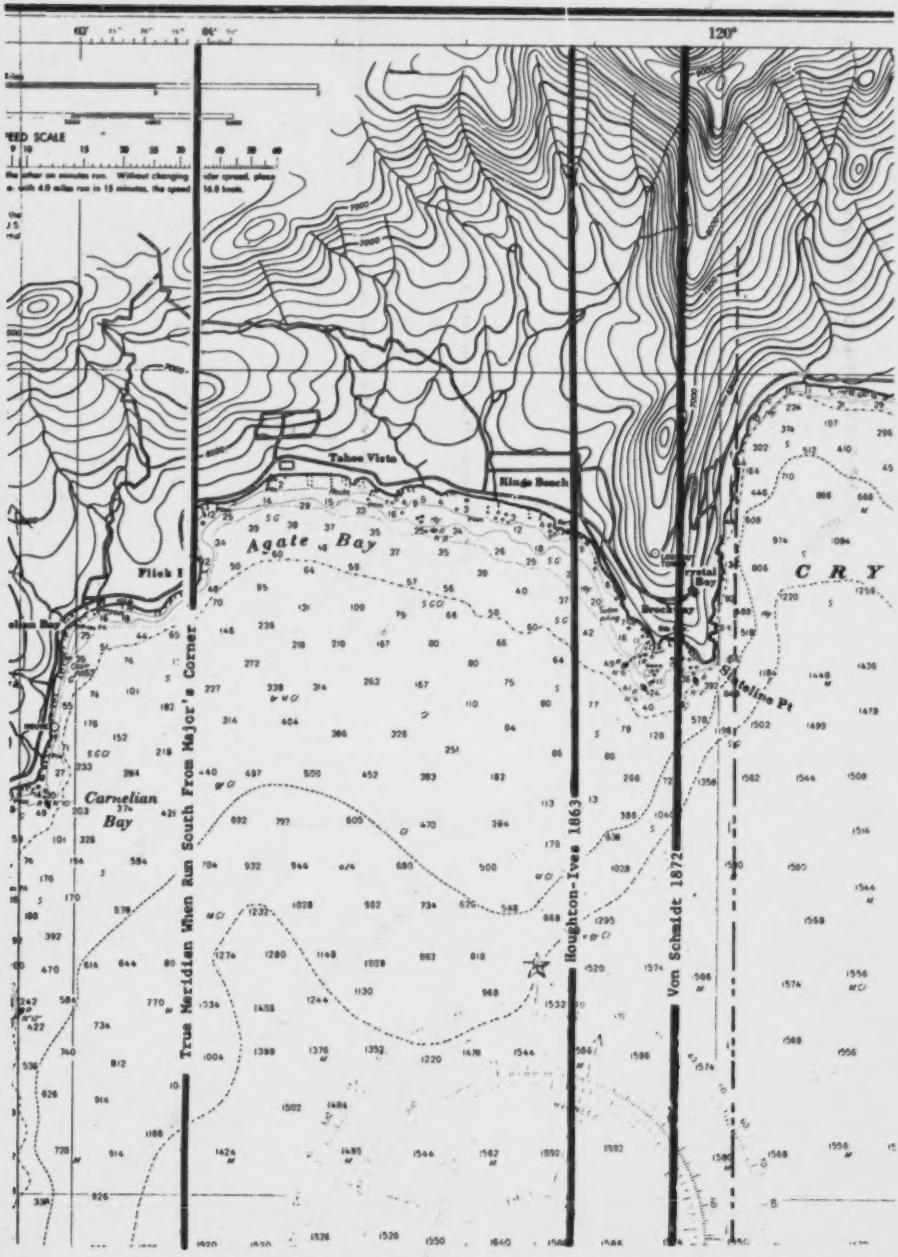


EXHIBIT "A" TO ANSWER

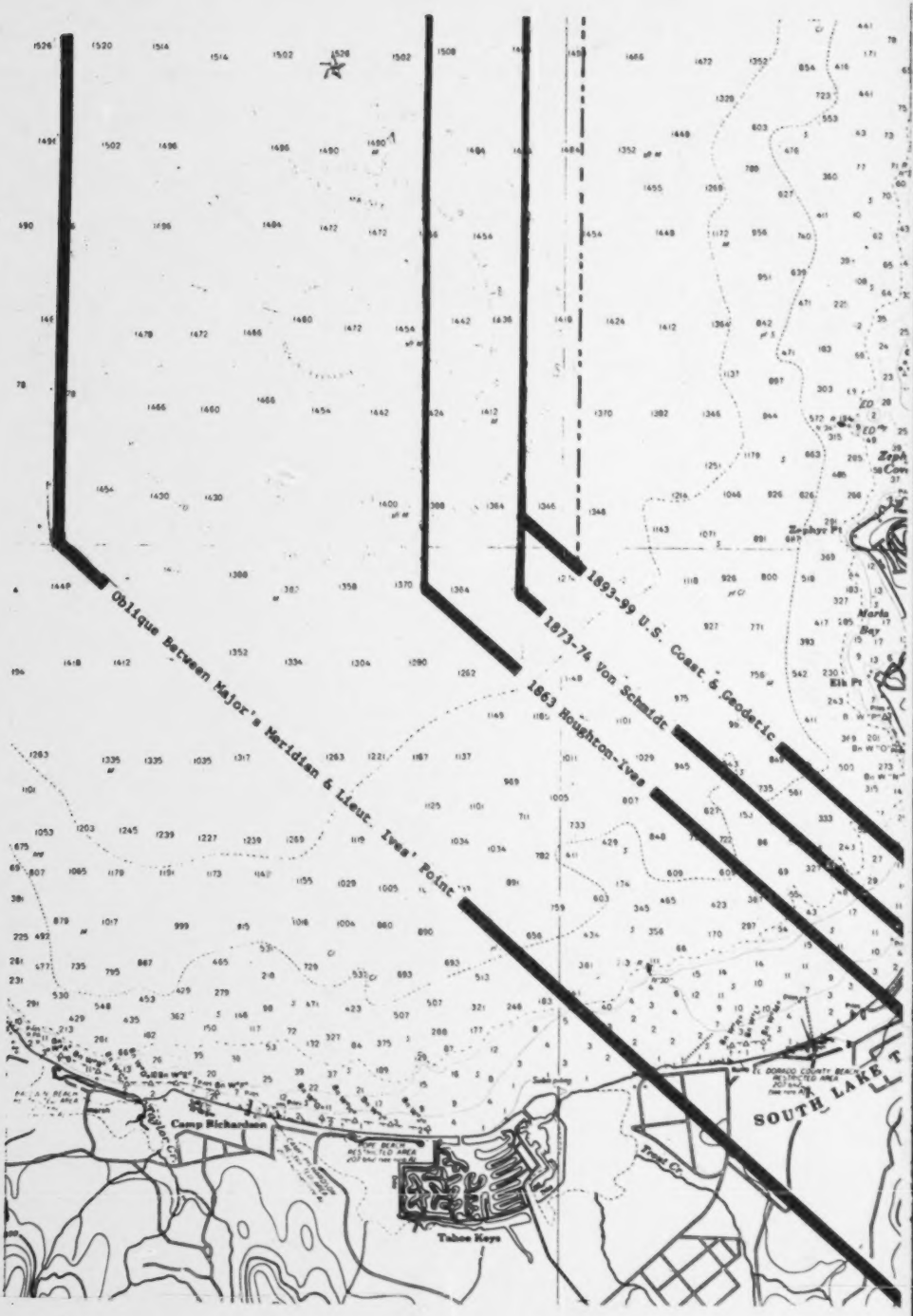


EXHIBIT "B" TO ANSWER

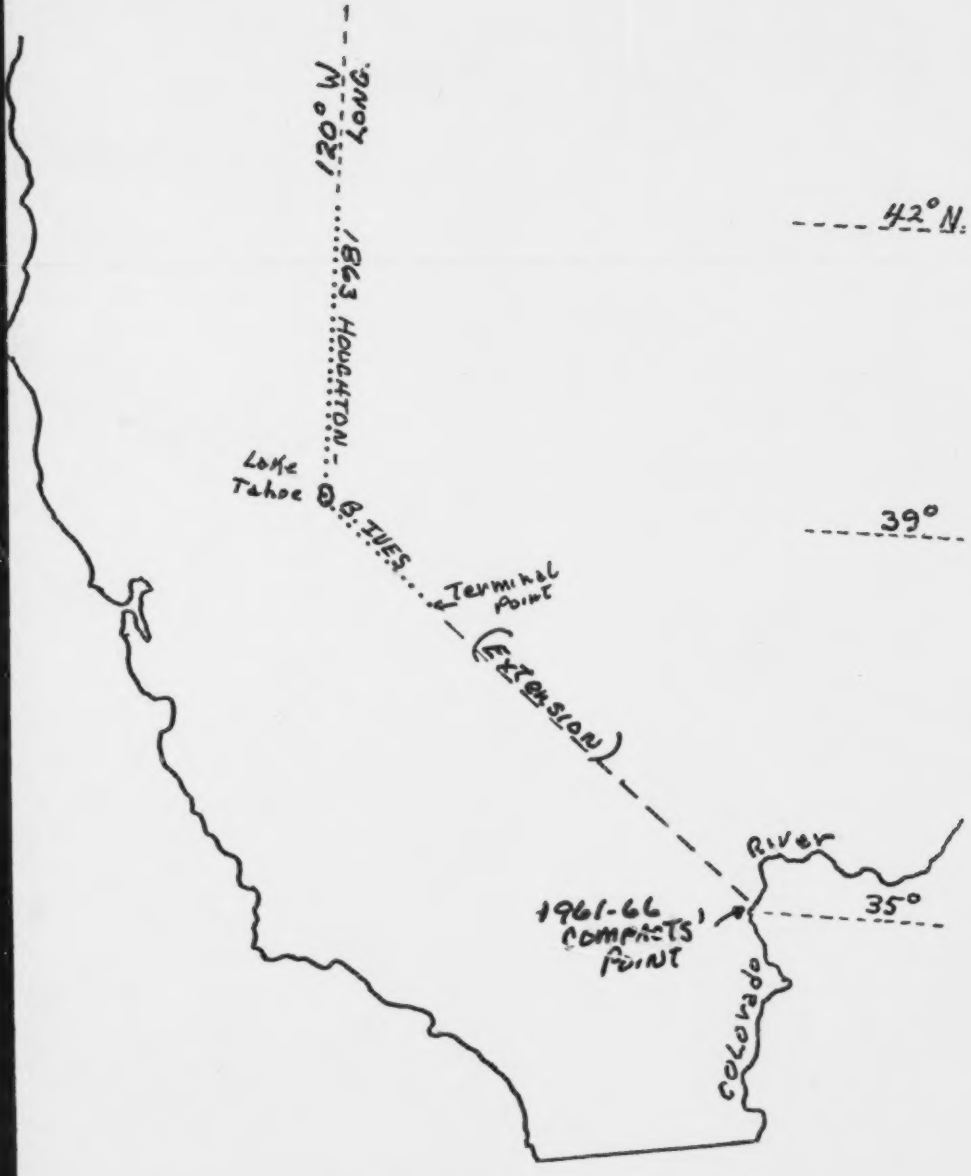
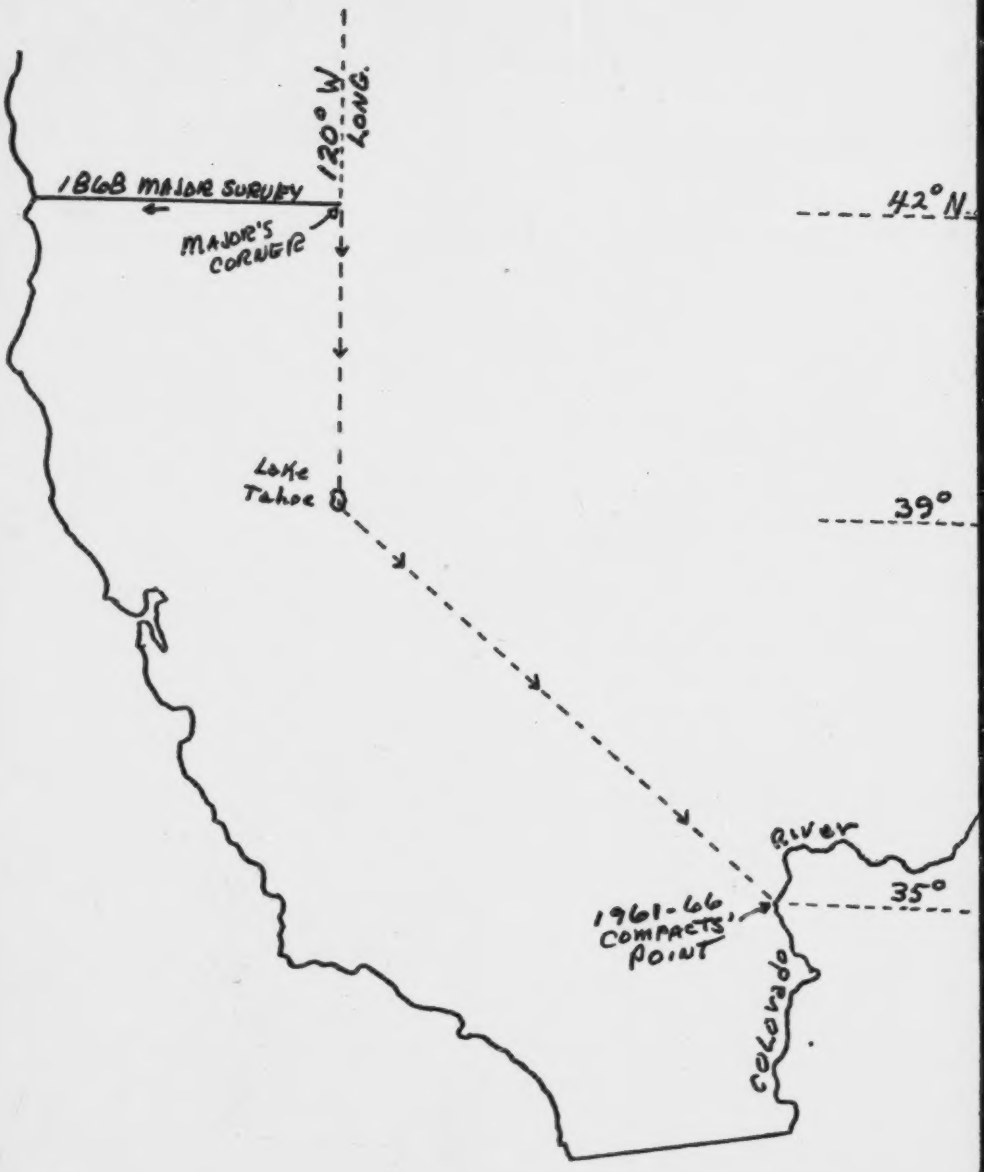


EXHIBIT "C" TO COUNTERCLAIM



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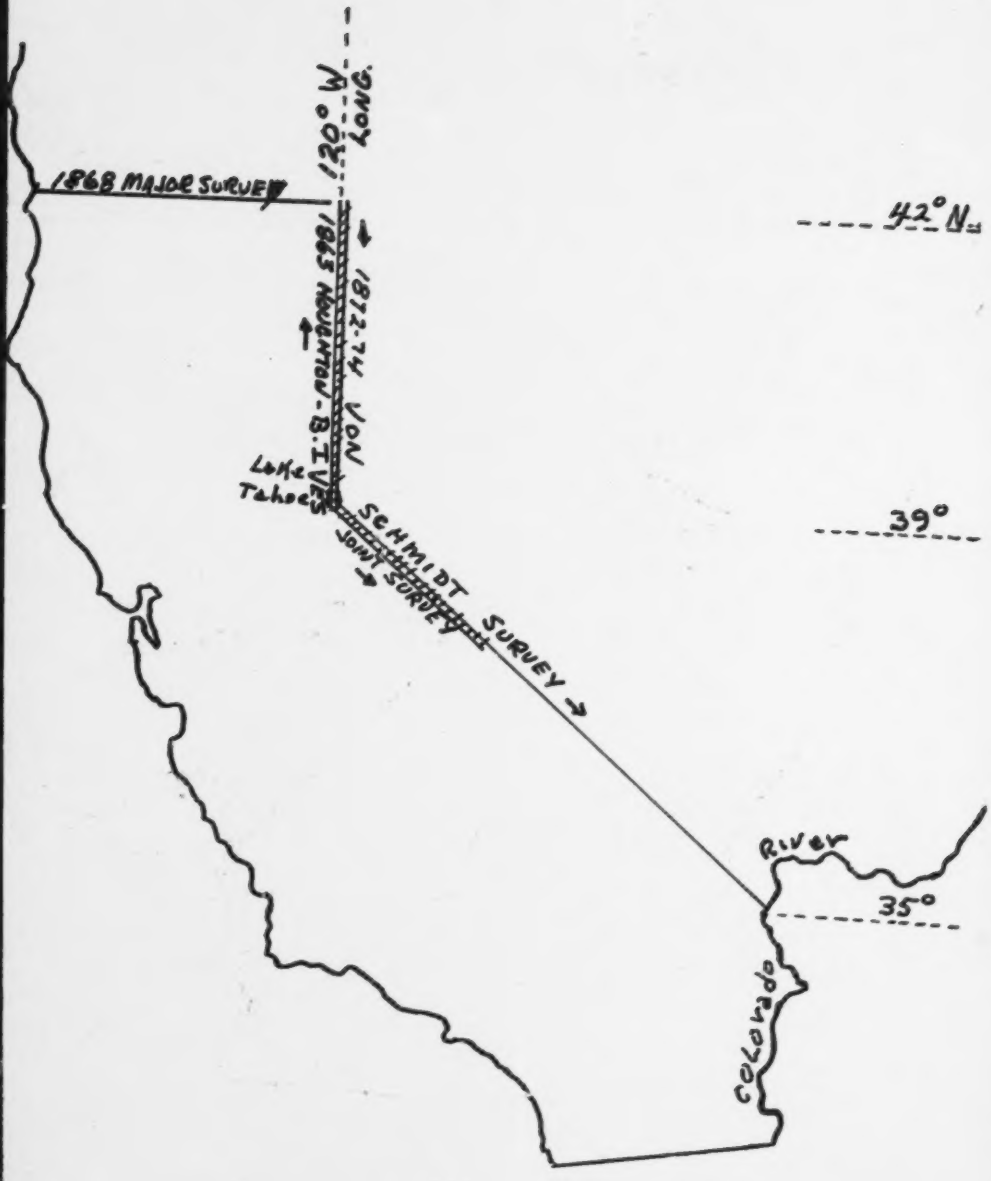

EXHIBIT "E" TO COUNTERCLAIM

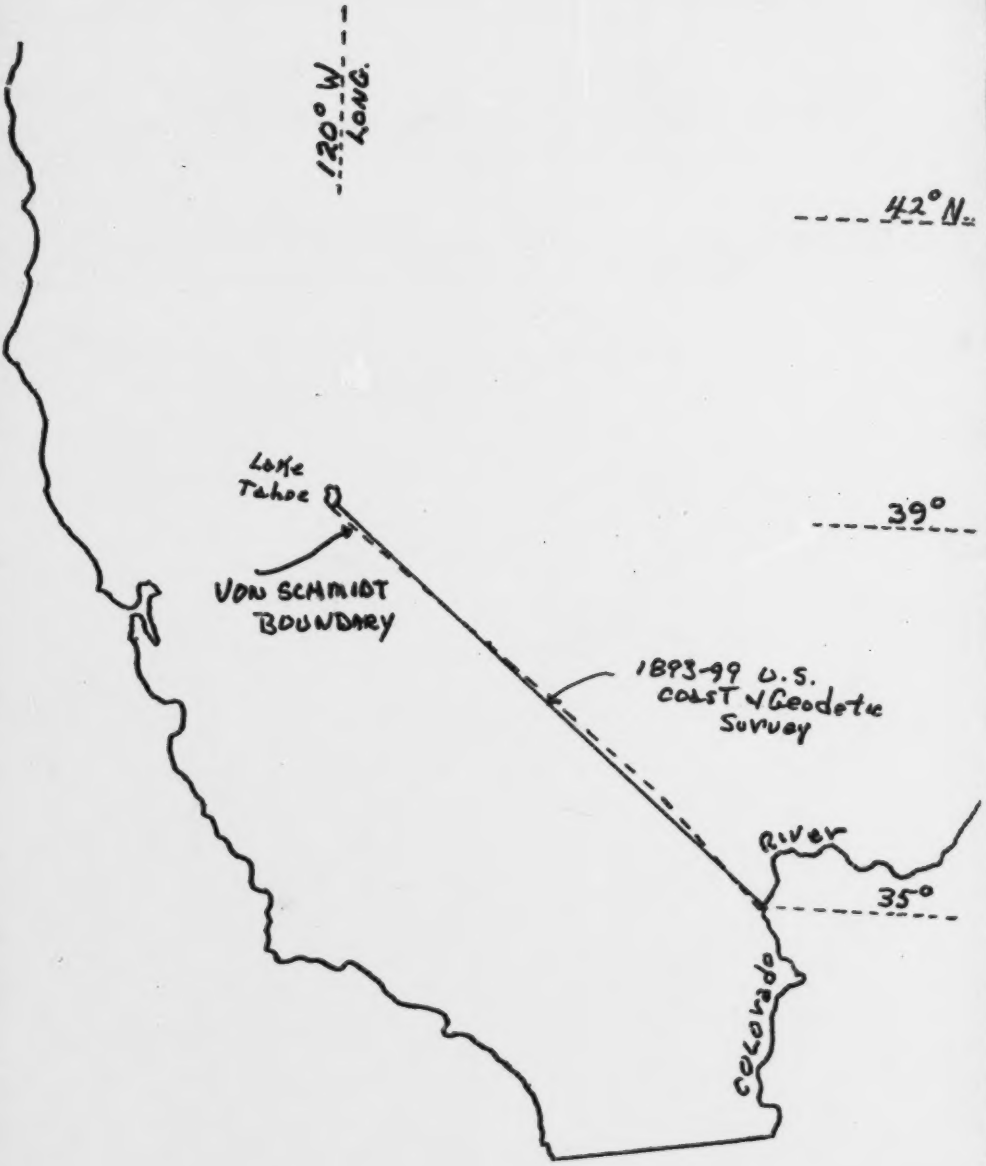

EXHIBIT "F" TO COUNTERCLAIM

Supreme Court, U. S.
FILED
MAY 2 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

Opposition to Motion for Leave to File Amended Answer Setting Forth Counterclaim and Amending Previous Answer and Points and Authorities in Support Thereof

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

Opposition to Motion for Leave to File Amended Answer Setting Forth Counterclaim and Amending Previous Answer and Points and Authorities in Support Thereof

INTRODUCTION

Defendant State of Nevada, through its motion for leave to file amended answer and counterclaim, is seeking to introduce totally new issues and to confuse existing issues by the introduction of new legal theories which plaintiff State of California believes have no merit. The nature and scope of this original action is briefly set forth in the introduction to plaintiff's statement in support of its motion for leave to file complaint. It was stated therein: "This is an action by the State of California against the State of Nevada to establish the California-Nevada boundary *from Lake Tahoe to the Oregon border.*" (Emphasis added.)

The purpose of seeking the original jurisdiction of the Supreme Court in this matter was to achieve an expedient and decisive resolution of a potentially serious conflict over the location of the lawful boundary between the two states along the meridian of one hundred twenty degrees longitude west from Greenwich. This is the heart of the dispute before the Court.

The history of such controversy is set forth in plaintiff's motion for leave to file complaint and, therefore, will not be restated herein. Suffice it to say, however, notwithstanding over 100 years of common recognition by both states of the line surveyed by Allexey Von Schmidt in 1872, there is uncertainty as to whether or not this line has become the legally enforcible boundary between the states from Lake Tahoe to the Oregon border. This uncertainty is important to resolve without delay, particularly in the vicinity of the populous north shore of Lake Tahoe, in order to eliminate the potentiality for confusion in the enforcement of civil and criminal laws of the respective states and their local instrumentalities. Were it not for the need for prompt clarification it is likely that the parties would have resorted to compact legislation to resolve the matter.

By contrast, neither plaintiff nor defendant has produced or found any evidence of controversy over the location of the interstate boundary south of Lake Tahoe to the Colorado River. It is precisely because of the absence of any such controversy that plaintiff chose not to include that boundary in its complaint. Plaintiff submits that in all probability it was for the very same reason the defendant chose not to include the matter in any pleading at the time it filed its answer.

The issues between the parties have heretofore been quite clear and are set forth in their initial pleadings. Plaintiff

seeks to have the Court decree the eastern boundary of California between the thirty-ninth and forty-second degrees of north latitude is that line surveyed by Allexey Von Schmidt in 1872 on the basis alleged that California has exercised dominion, jurisdiction and control for 105 years to this line. Defendant, on the other hand, seeks to have the Court decree that this boundary is that line surveyed by Houghton and Ives in 1863 on the basis that it is the only line statutorily recognized by the two states as their respective mutual boundaries in the area in question. In fact, defendant states in paragraph X of its answer: "The State of Nevada alleges that only two lines are in contention, those being the 'Houghton-Ives' line and the 'Von Schmidt' line."

Nevada now seeks to expand its claim relating to the boundary north of the thirty-ninth degree north latitude and to expand the litigation to include the oblique portion of the boundary, i.e., that portion of the boundary extending in a southeasterly direction between the point of intersection of the one hundred-twentieth degree of west longitude and the thirty-ninth degree north latitude and the point of intersection of the Colorado River and the thirty-fifth degree north latitude. For the reasons stated at length below this proposed expansion of the issues should not be permitted.

LEAVE TO AMEND MAY BE DENIED IN THE DISCRETION OF THE COURT

Defendant, in its memorandum of points and authorities, is asking the Court to grant leave to amend its answer by adding a counterclaim omitted from its initial pleading under the provisions of rules 13(f) and 15(a) of the Federal Rules of Civil Procedure. As defendant has essentially pointed out, the spirit of the rules as expressed in their

provisions and as interpreted by the courts is to freely and liberally allow the amendment of pleadings for the purpose of bringing all appropriate issues and facts before the court when it will serve the interests of justice. (*Foman v. Davis* (1962) 371 U.S. 178; *Dombrovskis v. Murff* (S.D. N.Y. 1959) 24 FRD 302; 3 Moore's Federal Practice (2d ed. 1974) par. 15.08; 7 Volz, West's Federal Practice Manual (2d ed. 1970) par. 7984.)

Notwithstanding the liberal policy with respect to the amendment of pleadings, the courts will exercise discretion to determine whether or not an amendment is meritorious and they may deny leave to amend for good or sufficient reason. The courts have commonly refused to grant leave to amend when the amendment is unduly delayed, not offered in good faith, would cause undue prejudice to the other party, or when it is legally insufficient to support a valid claim. (3 Moore's Federal Practice (2d ed. 1974) par. 15.08.)

A. The Amendment Would Prejudice Plaintiff

Plaintiff believes that defendant's counterclaim would prejudice plaintiff because it would unnecessarily prolong the litigation by introducing extraneous new matter. Not only would the counterclaim obfuscate the issues and the facts presently before the Court, but it would create the necessity for further, time-consuming discovery.

B. The Counterclaim Is Legally Insufficient

As set forth in more detail below, plaintiff believes the new matter contained in defendant's counterclaim is not meritorious as it lacks legal sufficiency. There is ample authority for a court's refusal to grant leave to amend a pleading when the amendment is clearly without legal merit

(*Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.* (E.D.Pa. 1969) 309 F.Supp. 1057; *Kaplan v. United States* (C.D.Cal. 1967) 42 F.R.D. 5; *U. S. v. Two Lots of Ground* (E.D.Pa. 1962) 30 F.R.D. 5); or, in the absence of facts, to support a proposed counterclaim (*Browne-Vintners Company, Inc. et al. v. National Distillers Products Corp.* (S.D.N.Y. 1953) 15 F.R.D. 205). *Philadelphia Housing Atuhority, supra,* is analogous to the situation at hand because the proposed amendment would have involved the prolongation of discovery. The court stated as follows:

> "When leave to amend is sought to assert claims devoid of foundation, it should be denied, particularly where, as here, the statement of claims in the complaint is the stepping off point for very far-reaching discovery." (309 F.Supp. at p. 1064.)

Notwithstanding the application of Federal Rules of Civil Procedure to ordinary cases, this Court has given the rules special application in cases within its original and exclusive jurisdiction. In the case of *Ohio v. Kentucky* (1973) 410 U.S. 641, the question before the Court was the location of the boundary between those two states where they were separated by the Ohio River. Federal navigational projects between 1910 and 1929 had caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. Ohio claimed that the northern boundary of Kentucky was along the northerly low-water mark of the Ohio River as it existed in 1792, the year Kentucky became a state. Kentucky claimed that its northern boundary was along the northerly low-water mark of the river as it existed under the changed conditions. Ohio then sought to amend its complaint by asserting that the boundary between it and Kentucky was the middle of the Ohio River or,

alternatively, the 1792 low-water mark on the northerly shore. The Court, in denying Ohio's motion for leave to amend, stated as follows:

> "We need intimate no view on the merits of Ohio's historical analysis for the state's long acquiescence in the location of her southern border at the northern edge of the Ohio River, and her persistent failure to assert a claim to the northern half of the river, convince us that she may not raise the middle-of-the-river issue at this very late date." (410 U.S. at p. 649.)

In analyzing the procedures applicable to its consideration of the motion for leave to file an amended complaint, the Court stated as follows:

> "Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Const., Art. III, § 2; 28 U.S.C. § 1251(a). Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. See United States Supreme Court Rule 9; *Rhode Island v. Massachusetts,* 14 Pet. 210 (1840). Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. See, for example, *Alabama v. Texas,* 347 U.S. 272 (1954); *California v. Washington,* 358 U.S. 64 (1958); *Virginia v. West Virginia,* 234 U.S. 117, 121 (1914). Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly

add to the expense that the litigants must bear." (410 U.S. at p. 644.)

The case of *Ohio v. Kentucky* has direct application to this case and is authority for denying leave to amend pleadings when such amendment would offer nothing of merit to the action.

Defendant's proposed amended answer and counterclaim fails to state meritorious claims for the following reasons:

COUNT I

Count I of Nevada's proposed counterclaim alleges that the boundary line between the States of Nevada and California was established by a survey conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner of the Territory of Nevada. (Count I, par. I, p. 8.)

This amendment should not be permitted. Nevada's claim to the portion of the line north of the thirty-ninth degree of north latitude based on the Houghton-Ives survey is already in issue. (Defendant's answers, pars. IV-XI and prayer, pp. 3-7.) Therefore, count I adds nothing to the case as it relates to this segment of the boundary. Nevada's proposed amendment in count I relating to the oblique portion of the boundary should not be permitted as it fails to state facts entitling Nevada to relief.

The line presently observed by both states as the oblique boundary is the line surveyed and marked by the United States Coast and Geodetic Survey between 1893 and 1900. During the past 78 years the substantial accuracy of this survey has not been questioned. More importantly, during this period of time both states have used and relied upon this line without interruption. Furthermore, both states

have adopted this line by statute as the oblique portion of their common boundary (Cal. Stats. 1901, ch. 73, p. 89; Nev. Stats. 1903, ch. 15, p. 38. See exhibit A and exhibit B attached.)

Nevada now attempts to manufacture a new oblique boundary line out of whole cloth asserting no facts which would provide a legal basis for its recognition. The proposed "line" begins with the 100 miles of the oblique boundary surveyed by Houghton and Ives (proposed amended answer and counterclaim count I, par. III, p. 9). To concoct the remaining three-quarters of the boundary, Nevada suggests that a theoretical line be drawn connecting the Houghton and Ives point of termination and a point set by compact between California and Arizona and Arizona and Nevada. (Proposed amended answer and counterclaim, count I, pars. III-IV, pp. 9-10, and prayer, p. 15.)

There is no authority whatever for the establishment of the "line" proposed in count I. It is clear from a careful reading of the interstate boundary cases that the boundaries between states are those described in the legislation creating the states (*Oklahoma v. Texas,* (1926) 272 U.S. 21, 49) unless a new boundary line has been established by operation of facts giving rise to the doctrine of acquiescence (*Ohio v. Kentucky, supra,* 410 U.S. 641, 651; *Maryland v. West Virginia* (1910) 277 U.S. 1, 42; *Indiana v. Kentucky* (1890) 136 U.S. 479, 510; *Virginia v. Tennessee* (1893) 148 U.S. 503, 522). The Court explained this doctrine in *Oklahoma v. Texas, supra,* 272 U.S. at page 44:

> "It is well settled that governments, as well as private persons, are bound by the practical line that has been recognized and adopted as their boundary, *Missouri v. Iowa,* 7 How. 600, 670, 12 L. Ed. 861; *New Mexico v. Colorado,* 267 U.S. 30, 40, 45 S. Ct. 202, 69 L. Ed. 499; and that a boundary line between two

governments which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by them for a long course of years, is *conclusive*, even if it be ascertained that it varies somewhat from the correct course, the line so established taking effect in such case, as a definition of the true and ancient boundary, *Virginia v. Tennessee*, 148 U.S. 503, 522, 13 S. Ct. 728, 37 L. Ed. 537; *Maryland v. West Virginia*, 277 U.S. 1, 42, 30 S. Ct. 268, 54 L. Ed. 645; *New Mexico v. Colorado supra*, at page 40 (45 S. Ct. 202)." (Emphasis added.)

If the facts are insufficient to demonstrate that a new boundary has been established by prescription or acquiescence, the described boundary continues to be the legal boundary between the states. Thus in *Oklahoma v. Texas, supra*, after the Court concluded that the interstate boundary had not been established by acquiescence, it ordered an accurate survey of the true one hundredth meridian. (*Oklahoma v. Texas, supra*, 272 U.S. at p. 49.)

Nevada has not alleged any facts which would establish prescriptive rights in the "line" proposed in count I. The facts alleged reveal that the "line" has not been run out and marked on the ground as required before prescriptive rights in a boundary can be acquired. Furthermore, no practical use of this "line" as the boundary has been alleged. Though it is contended that the states adopted the line as their boundary by statute (proposed amended answer and counterclaim, count I, par. I, p. 8), it is clear that California adopted only so much of the line as had been *actually surveyed* by Houghton and Ives. (Cal. Stats. 1864, ch. 455, pp. 506-507. See exhibit C attached.) Furthermore, as previously noted, both states subsequently adopted the United States Coast and Geodetic Survey as the oblique boundary. (See exhibit A and exhibit B attached.)

Since defendant State of Nevada has not stated facts sufficient to show that this "line" has been established by prescription or by operation of the doctrine of acquiescence, the only other possible basis for its recognition is that this "line" is the accurate location of the boundary described in California's Constitution and referenced in Nevada's Constitution, i.e., the line extending between the point of intersection of the true one hundred twentieth meridian and the true thirty-ninth degree of north latitude and the point of intersection of the thirty-fifth degree of north latitude with the Colorado River. Defendant has not so alleged.

In short, the allegations of count I fail to state any facts demonstrating that Nevada is entitled to a decree establishing the proposed line as the oblique portion of the California-Nevada boundary. The proposed amendment should therefore be denied.

COUNT II

Defendant State of Nevada's count II suffers from the same defects as count I. It fails to state any facts showing that Nevada is entitled to the relief requested.

In count II Nevada asks the Court to devise a boundary by connecting with lines three points: a point set by Daniel Majors in connection with the survey of the Oregon-California boundary; the unlocated point where a line drawn due south from Majors' point would intersect the thirty-ninth degree north latitude; and, a point allegedly set by Lieutenant Ives at the Colorado River.

There is no authority for the establishment of such a peculiar boundary. The existing authority is quite to the contrary.

The argument that establishment of a monumented point creates an interstate boundary line was directly considered

and rejected in *Oklahoma v. Texas, supra,* 272 U.S. 21. Texas argued that its common boundary with Oklahoma along the north-south segment of the panhandle should be established as a line running due north from a point known as the Kidder Monument set by a surveyor commissioned by the Department of Interior to set the point of intersection of the true one hundredth meridian with the South Fork of the Red River and adopted by Congress as such. The Court rejected the argument of Texas and, as previously noted, ordered a resurvey using more accurate, modern techniques. (At p. 49.)

Furthermore, count II like count I fails to state any facts which would show any other basis for a decree establishing this "line" as the boundary. It is not alleged that the proposed line would more accurately identify the boundary described in the states' constitutions nor is it alleged that the line has been acquiesced in.

COUNT III

The part of the boundary line north of the forty-second degree north latitude surveyed by Allexey Von Schmidt is already in issue. In its initial pleading, the State of California has alleged that this line has become the interstate boundary north of the forty-second by operation of facts giving rise to the doctrine of acquiescence. (Plaintiff's complaint, pars. VII-XI, pp. 3-5.) Therefore, Nevada's purported amendment adds nothing to the case as it relates to the Von Schmidt survey of the northern segment of the boundary.

Nevada's allegations as to the Von Schmidt survey of the oblique boundary suffer from essentially the same defects as the other counts. There are no allegations that this survey is an accurate delineation of the described boundary

and there are no allegations of facts giving rise to the operation of the doctrine of acquiescence.

Nevada's allegations in each count relating to violations of article IV, section 3 of the United States Constitution and the 10th amendment thereto add nothing to its claims. The apparent argument is that interference with a surveyed or partially surveyed boundary line is an interference with a state's sovereign powers and, therefore, unconstitutional.

Such an argument is clearly without merit. There is no authority for the proposition that the mere act of surveying a point or a line fixes the boundary of a state or establishes any other sovereign rights. It follows, therefore, that absent facts showing that the line is entitled to enforcement by virtue of its accuracy or by operation of the doctrine of acquiescence, no interference with sovereign rights results from the correction, alteration, obliteration or abandonment of the line.

CONCLUSION

Each of the amendments proposed by Nevada is without merit and will serve only to confuse and delay timely resolution of this suit. Plaintiff therefore respectfully requests that the Court follow the precedent set in *Ohio v. Kentucky, supra,* 410 U.S. 641, and deny leave to amend.

DATED: April 25, 1978.

Respectfully submitted,

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Exhibit A

CHAPTER LXXIII.

An act to define and establish a portion of the eastern boundary of the State of California.

[Became a law under constitutional provision without Governor's approval, March 1, 1901.]

The people of the State of California, represented in senate and assembly, do enact as follows:

Defining the eastern boundary of State of California.

SECTION 1. That portion of the eastern boundary line of the State of California southeastward from Lake Tahoe, and extending to the Colorado river; that is to say: southeastward from the intersection of the thirty-ninth degree of north latitude, with the one hundred and twentieth degree of longitude west from Greenwich, to the Colorado river, as lately surveyed, established and marked by the United States Coast and Geodetic Survey, completed during the year nineteen hundred, is hereby declared to be the true, correct and legal boundary line of the State of California between Lake Tahoe and the Colorado river, and the said line as surveyed, established and marked aforesaid, shall now and hereafter be recognized and considered by the courts of this state as the boundary of this state between the two said points, viz: Lake Tahoe and the Colorado river.

SEC. 2. All acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its passage.

Exhibit B

CHAP. XV.—*An Act to define and establish a portion of the western boundary of the State of Nevada.*

[Approved February 27, 1903.]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. That portion of the western boundary line of the State of Nevada southeastward from Lake Tahoe, and extending to the southwesterly corner of said State of Nevada, that is to say: Southeastward from the intersection of the thirty-ninth degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich to the southwesterly corner of said State of Nevada, as lately surveyed, established and marked by the United States Coast and Geodetic Survey, completed during the year 1900, and now recognized by the State of California, is hereby declared to be the true, correct and legal boundary line of the State of Nevada, between Lake Tahoe and the southwesterly corner of the State of Nevada, and the said line as surveyed, established and marked aforesaid shall now and hereafter be recognized and considered by the Courts of this State as the boundary of this State between the two said points. Defining boundaries of western portion of Nevada.

SEC. 2. All Acts and parts of Acts inconsistent with this Act are hereby repealed. Repealing clause

SEC. 3. This Act shall take effect and be in force from and after its passage. Date of effect.

Exhibit C

CHAP. CCCCLV.—*An Act relating to the establishment of the Eastern Boundary of the State of California.*

[Approved April 4, 1864.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. All that portion of the line dividing the State of California from the Territory of Nevada, as run and marked by the Surveyor-General of the State of California, in accordance with and by authority of an Act entitled an Act to provide for surveying and establishing the eastern boundary of the State of California, approved April twenty-seventh, eighteen hundred and sixty-three, commencing at the southern boundary of the State of Oregon, and terminating at a point near the White Mountains, south of the Town of Aurora, is hereby declared, so far as the same extends, to be the legal boundary line of the State of California, and shall be so considered by all the Courts of this State. Legal boundary line.

SEC. 2. The Surveyor-General shall, within six months from and after the passage of this Act, erect or cause to be erected such additional monuments upon said boundary line as is actually necessary, and he shall mark the termination of the said line near the White Mountains by erecting suitable monuments, and in such a manner as to enable the survey to be continued from that point at some future time. Monuments.

SEC. 3. The Surveyor-General shall, within twenty days from and after the passage of this Act, cause to be sold at public sale to the highest bidder, for gold or silver coin of the United States, all animals, equipments, and fixtures, Sale of equipments, etc.

purchased by him to carry out the provisions of the Act mentioned in section one of this Act, that are in his possession or under his control; *provided,* that all instruments belonging to the Surveyors' Department shall be retained in the office of the Surveyor-General of the State.

Disposition of moneys.

SEC. 4. The Surveyor-General shall give notice of such public sale as provided in section three of this Act by publishing notice of the same in some daily newspaper published in the City of Sacramento, for at least ten days prior to said sale, and all moneys accruing from said sale shall be paid to the State Treasurer, to be by him placed in the Fund created by the Act mentioned in section one of this Act. All moneys appropriated under the provisions of the Act mentioned in section one of this Act remaining unexpended at the expiration of six months from and after the passage of this Act, shall be placed in the General Fund.

Compensation.

SEC. 5. The Surveyor-General shall receive for all services required by this Act such compensation as may be allowed him by the State Board of Examiners, the same to be paid out of the moneys set apart for surveying said boundary line; *provided,* the same shall not exceed the sum of one thousand dollars.

SEC. 6. This Act shall take effect from and after its passage.

Supreme Court, U. S.
FILED
MAY 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

NEVADA'S REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDING PREVIOUS MOTION

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

NEVADA'S REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDING PREVIOUS MOTION

I. California Fails To Address Nevada's Assertion That The Counterclaim Is Compulsory And That Res Judicata Is Applicable.

Nevada's motion for leave to amend asserts that the counterclaim is a

compulsory counterclaim. Moreover, Nevada specifically alleges that the counterclaim must be raised in the case *sub judice* or she will be barred by the legal doctrine of *res judicata*.

Significantly, California *does not* contest the position of Nevada that the counterclaim is of a compulsory nature. Nor, does California contest Nevada's legal position that the doctrine of *res judicata* would bar raising the issues attempted to be set forth by the counterclaim in subsequent litigation. By failing to address the issues of whether the counterclaim is of a compulsory nature and the effect of the doctrine of *res judicata* upon future litigation, California should be deemed to have conceded that the counterclaim is compulsory in nature and that the doctrine of *res judicata* would bar the raising of the issues addressed therein in future litigation.

II. California's Belief That The Counterclaim Is Meritless Is Immaterial To A Decision On The Motion.

In essence, California's opposition is limited to an attack on the merits of the counterclaim. California does contend that the counterclaim raises no controversy. However, it should be sufficient to note from the length of California's opposition that it is evident a controversy does exist with respect to the issues attempted to be

raised by the counterclaim.

California urges at page 1 of her opposition that the motion to amend be denied because the issues addressed by the counterclaim are issues "which plaintiff State of California believes have no merit". If decisions to permit counterclaims and affirmative defenses are to be based on a plaintiff's belief with respect to the merits thereof, it is self-evident that few, if any, counterclaims would ever be allowed by way of amendment.

III. California Wrongly Asserts Defense Of Failure To State A Claim Which Is Normally Raised By A Motion To Dismiss Or A Reply

California states at page 7 in her opposition that count I of Nevada's proposed counterclaim relating to the oblique portion of the boundary "should not be permitted as it fails to state facts entitling Nevada to relief." This allegation of failure to state a claim for relief permeates the remainder of California's opposition. California is attempting to assert a defense normally reserved as a ground for a motion to dismiss or in a reply, that is, failure to state a claim upon which relief can be granted. The Federal Rules of Civil Procedure were enacted to simplify pleading so that only the "bare bones" need be exposed. California, however, urges the Court to look to the merits of

the counterclaim, and specifically to whether the counterclaim states a cause upon which relief can be granted, before Nevada has had an opportunity to support the counterclaim with factual evidence. California's position is contrary to the spirit and purpose of the Federal Rules of Civil Procedure, Rule 1.

IV. California Seeks To Add To Her Complaint An Issue Which She Says "Has Merit" And Yet Opposes Nevada's Proposed Counterclaim As Meritless.

Finally, it should be noted that on the same date that California filed her opposition to Nevada's Motion for Leave to File an Amended Answer Setting Forth Counterclaim, California also filed a Motion for Leave to amend her Complaint to add an additional claim for relief. Nevada does not contest California's Motion for Leave to Amend since it is Nevada's position that the Court should allow the parties to plead all legal theories of relief in the case *sub judice*. However, California apparently does not adhere to the same theory of litigation. In short, California seeks leave to amend to add what she considers an issue which "has merit" while simultaneously urging the Court to refuse to permit Nevada to set forth alternative legal theories which should be considered if the Court should determine that the "Von Schmidt" line is not the appropriate boundary. California's position

is untenable from every viewpoint.

Dated this 12th day of May, 1978.

Respectfully submitted,

ROBERT LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
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Counsel for Defendant
State of Nevada

CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General of Nevada, hereby certify that on the 12th of May, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.
Governor of California
State Capitol Building
Sacramento, California 95814

Evelle J. Younger
Attorney General of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

James H. Thompson
Chief Deputy Attorney General

Answer

2

Supreme Court, U. S.
FILED
JUL 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

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STATE OF NEVADA,

Defendant.

ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1976

NO. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM

COMES NOW, the State of Nevada by and through her Attorney General, Robert List, and answers the amended complaint of the State of California in this original proceeding as follows:

I.

The State of Nevada admits Pararaph I of the amended complaint.

II.

In answer to Paragraph II of the amended complaint, the State of Nevada admits that the description of the boundary of the State of California was described in 1849 as set forth in the amended complaint. However, the

State of Nevada denies that the description of the boundary of the State of California is presently described as set forth in Paragraph II of the amended complaint. The State of Nevada further denies that Exhibit 1 is an accurate representation of the placement of the boundary described in Paragraph II of the amended complaint and demands strict proof thereof.

III.

In answer to Paragraph III of the amended complaint, the State of Nevada admits that she was admitted to this Union of United States by Act of Congress and Presidential Proclamation as stated in Paragraph III of the amended complaint. The State of Nevada further admits that the language of Article Fourteen, Section 1 of the Nevada Constitution which is quoted in Paragraph III of the amended complaint is contained in said Article Fourteen, Section 1 of the Nevada Constitution. However, the State of Nevada denies that the language quoted in Paragraph III of the amended complaint is complete and alleges that the entire description of Nevada's boundaries is as follows:

> The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty eighth degree of Longitude West from Washington with the Thirty Seventh degree of North latitude; Thence due West along said thirty seventh

degree of North latitude to the eastern boundary line of the State of California; thence in a North Westerly direction along said Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington; Thence North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California to the forty second degree of North Latitude; Thence due East along the said forty second degree of North Latitude to a point formed by its intersection with the aforesaid thirty eighth degree of Longitude west from Washington; Thence due South down said thirty eighth degree of West Longitude to the place of beginning. And whensoever Congress shall authorize the addition to the Territory or State of Nevada of any portion of the territory on the Easterly border of the foregoing defined limits, not exceeding in extent one degree of Longitude, the same shall thereupon be embraced within, and become a part of this State. And furthermore Provided, that all such territory, lying West of and adjoining the boundary line

> herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this State. Nevada Constitution, Article Fourteen, Section 1.

IV.

The State of Nevada admits all portions of Paragraph IV of the amended complaint.

V.

The State of Nevada admits all portions of Paragraph V of the amended complaint and alleges that the People of California as recently as November 7, 1972, adopted the 1863 "Houghton-Ives" boundary line by amending their constitution fixing California's boundary to be as described in the 1849 Constitution except "as modified pursuant to statute."

VI.

In answer to Paragraph VI of the amended complaint, the State of Nevada admits that the "Houghton-Ives" line was adopted by the legislature of the State of Nevada in 1865 as the legal western boundary of Nevada, notwithstanding the fact that Nevada's Constitution described her western boundary along the 43rd Meridian West of Washington. The correct citation of such adoption is

Statutes of Nevada 1864-1865, Ch. 31, pp. 133-134, 379. The State of Nevada admits that said line was observed by the State of Nevada from 1865 to 1872.

VII.

In answer to Paragraph VII of the amended complaint, the State of Nevada admits that in 1872 the United States Government through its General Land Office entered into a contract with Allexey W. Von Schmidt. The State of Nevada admits that the purpose of the contract between the United States and Allexey W. Von Schmidt was to survey, post and monument the One Hundred Twentieth Meridian between the Forty Second and Thirty Ninth degrees of North latitude. The State of Nevada alleges that the survey was to begin at the point of intersection of the Forty Second degree of North latitude with the One Hundred Twentieth Meridian as established by U. S. Surveyor and Astronomer Daniel G. Major in 1868, and proceed on a true meridian south to the intersection of the Thirty Ninth degree of North latitude with the One Hundred Twentieth Meridian. The State of Nevada admits that a line known as the "Von Schmidt" line was surveyed, posted and monumented, and admits that the "Von Schmidt" line varies in location from the "Houghton-Ives" line. However, the State of Nevada denies that the variation is from 3000 to 6000 feet as alleged in Paragraph VII of the amended complaint for lack of information and

belief and demands strict proof thereof. The State of Nevada admits that since 1873 both states have exercised and continue to exercise political jurisdiction and sovereignty up to the "Von Schmidt" line as presently marked on the ground. The State of Nevada denies that the "Von Schmidt" line constitutes the lawful boundary between the states by acquiescence.

VIII.

In answer to Paragraph VIII of the amended complaint, the State of Nevada admits that a controversy exists between the States of California and Nevada as alleged in Paragraph VIII of the amended complaint. However, the State of Nevada lacks sufficient information and belief to form an answer as to the exact width of the area in dispute and therefore denies that said area is approximately 3000 feet wide at the north end of Lake Tahoe and increases to 6000 feet wide and demands strict proof thereof. The State of Nevada specifically denies that the area between the 1863 Houghton-Ives line and the 1872 Von Schmidt line is the only area in dispute. The areas in dispute as they relate to the Lake Tahoe area are shown on Exhibits "A" and "B" attached to this Amended Answer.

IX.

In answer to Paragraph IX of the amended complaint, the State of Nevada

admits that the State of California has exercised jurisdiction to the "Von Schmidt" line as presently marked on the ground since 1873. The State of Nevada denies that the State of California has now or in the past obtained dominion in the lands in question. The State of Nevada further denies she has acquiesced in California's exercise of sovereignty and jurisdiction or that California has obtained title to the land in question.

X.

The State of Nevada admits that the "Von Schmidt" line has, from time to time since 1872, been questioned in the reports of governmental agencies and that such reports have caused uncertainty and the recurring possibility of challenges to the lawfulness of such boundary line. The State of Nevada admits that Exhibit 2 does show some lines which are in contention, but shows others which are not in contention. Additionally, other lines are in contention which are not depicted. The State of Nevada admits that neither State has demanded a resurvey of the "Von Schmidt" line north of its intersection with the Thirty Ninth degree of North Latitude.

XI.

The State of Nevada does not construe Paragraph XI of the amended

complaint as requiring an answer. However, to the extent that an answer should be required, the State of Nevada denies the allegations set forth in Paragraph XI and demands strict proof thereof.

COUNTERCLAIM

COMES NOW the defendant State of Nevada and pursuant to Federal Rule of Civil Procedure 13(a), and counterclaims against the plaintiff State of California as follows:

COUNT I

CLAIM FOR HOUGHTON-B. IVES BOUNDARY

I.

The boundary line between the States of Nevada and California was established by a survey conducted pursuant to agreement of the State of California and the Territory of Nevada in 1863. Said survey was conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner appointed by the Territory of Nevada. The "Houghton-B. Ives" line was adopted by the California Legislature in 1864 as the Eastern boundary line of the State of California (Cal. Stats. 1864, Chap. 455, pp. 506-507, reenacted as California Government Code Section 160 in 1943 Cal. Stats. 1943, Chap. 134, p. 896). The Legislature of the State

of Nevada adopted the "Houghton-B. Ives" line as the legal Western boundary line of the State of Nevada in 1865. Statutes of Nevada 1864-1865, Chap. 31, pp. 133-134, 379.

II.

The "Houghton-B. Ives" line was surveyed pursuant to agreement of the Territory of Nevada and the State of California to set the boundary line on the One Hundred Twentieth Meridian between the Forty Second degree of North Latitude and the Thirty Ninth degree of North Latitude and southeasterly on a line between the intersection of the One Hundred Twentieth Meridian and the Thirty Ninth degree of North Latitude to the point established by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

III.

The "Houghton-B. Ives" line was surveyed and monumented between its intersection with the Thirty Ninth degree of North Latitude and its intersection with the Forty Second degree of North Latitude and for approximately one hundred miles Southeasterly on a line directed from the point of intersection with the Thirty Ninth degree of North Latitude to the intersection of the Thirty Fifth degree of North Latitude with the Colorado River as that point was established in 1861 by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, pursuant to Act

of Congress of May 26, 1860. (See Exhibit C)

IV.

One hundred years later, in 1961, Congress gave its consent, 75 Stat. 93, to a Compact between Arizona and Nevada defining a portion of the common boundary on the Colorado River beginning at the point where the Nevada-California state line intersects the Thirty Fifth degree of North Latitude. The Arizona-Nevada boundary compact established the point of said intersection with the Thirty Fifth degree North Latitude at the Colorado River. In 1966 Congress gave its consent, 80 Stat. 340, to a Compact between Arizona and California defining their common boundary from the intersection of the boundary line common to California-Nevada and the center line of the channel in the Colorado River as constructed by the U. S. Bureau of Reclamation. The compact expressly recognizes the said point of intersection of the Thirty Fifth degree North Latitude with the Colorado River channel as being common to the boundaries of Arizona, California and Nevada. Thus, the point of intersection of the Thirty Fifth degree of North Latitude with the Colorado River was conclusively established as being the terminal point of the oblique boundary to which the Houghton-B. Ives boundary should be extended.

V.

Under the 1872 contract with the United States alleged in Paragraph VII of the Answer, Allexey W. Von Schmidt conducted

a survey of the eastern boundary of California between its intersection with the Forty Second and Thirty Ninth degrees of North Latitude and from the point of intersection of the One Hundred Twentieth Meridian and the Thirty Ninth Degree of North Latitude on a Southeasterly line to the intersection of the Thirty Fifth degree of North Latitude and the Colorado River. In conducting said survey Allexey W. Von Schmidt, who was acting as an agent of the United States Government, physically moved the boundary between the State of California and the State of Nevada Easterly along its entire length. (See Exhibit D)

VI.

The authorization by Congress of the Von Schmidt survey was in excess of the powers granted to Congress by Article One, Section 8 of the United States Constitution and therefore in violation of the Tenth Amendment to the United States Constitution in that the United States Government purported to take from the State of Nevada and add to the State of California in excess of six hundred square miles. The "Von Schmidt" survey is thus an unconstitutional survey and a nullity from its inception.

VII.

The action of the United States Government by and through its agent Allexey W. Von Schmidt in physically moving the boundary of the State of Nevada without the prior and express consent of the State of Nevada was in violation of Article Four,

Section 3 of the United States Constitution and is therefore unconstitutional.

COUNT II.

ALTERNATIVE CLAIM FOR BOUNDARY FROM MAJOR'S CORNER TO THE COLORADO RIVER

VIII.

The Counterclaimant State of Nevada alleges and incorporates Count I of the Counterclaim as though the same was fully set forth herein.

IX.

Alternatively, if the "Houghton-B. Ives" line did not establish the boundary between Nevada and California, then the boundary between Nevada and California was conclusively established when the North-eastern corner of California was set and monumented in 1868 by Daniel G. Major, U. S. Surveyor and Astronomer, under contract with the United States Government, pursuant to the Act of Congress of March 2, 1867, 14 Stat. 465, at the intersection of the One Hundred Twentieth Meridian with the Forty Second degree of North Latitude. The monument set by Major is standing intact at the present date.

X.

Upon Major's monumenting the Northeast corner of California, which is

the beginning point of California's constitutional boundary, the landmass of the States of California and Nevada with respect to their common boundary was defined and could be connected on the ground by following the description contained in the Constitution of the State of California. That is, by proceeding due South on a true meridian from the corner established by Daniel G. Major; determining where said true meridian South intersected with the Thirty Ninth degree of North Latitude; and at such point taking a line southeasterly to the point established by Lieutenant J. C. Ives at the intersection of the Thirty Fifth degree of North Latitude in the Colorado River. (See Exhibit D)

XI.

The common border of California with Nevada having thus been fixed with the establishment of Major's corner, the action of the United States Government, through its agent Allexey W. Von Schmidt, in physically moving the Northeast corner of the State of California (being also the Northwest corner of the State of Nevada) to the East and then running and monumenting the entire boundary of California and Nevada on the basis of the "new" Northeast corner of California, thereby moving the entire boundary eastward, was violative of Article Four, Section 3 of the United States Constitution and the Tenth Amendment to the United States Constitution in that by such action the United States purported to take territory of the State of Nevada and attach the same to the State of California. (See Exhibit E)

COUNT III

ALTERNATIVE CLAIM FOR THE "VON SCHMIDT" BOUNDARY IN ITS ENTIRETY

XII

Counterclaimant State of Nevada alleges and incorporates Counts I and II of the counterclaim as though the same were fully set forth herein.

XIII.

Alternatively, if neither the "Houghton-B. Ives" boundary nor the boundary established by the corner set by Daniel G. Major in 1868 constitute the boundary between the States of California and Nevada, then the boundary was first established by Allexey W. Von Schmidt in 1872-1874.

XIV.

During the period 1893-1899, the United States Government, at the request of the representatives of the State of California and following correspondence with the Governor of California, undertook a resurvey of and then physically moved the oblique portion of the "Von Schmidt" line. Said action was taken without the prior and express consent of the State of Nevada. (See Exhibit F)

XV.

The action of the United States Government in physically moving the

"oblique boundary" of Nevada and California was in violation of Article Four, Section 3 of the United States Constitution and the Tenth Amendment thereto, in that the United States Government purported to take territory of Nevada and attach the same to California.

COUNT IV

ALTERNATIVE CLAIM FOR NEW SURVEY OF THE FORTY-THIRD MERIDIAN WEST OF WASHINGTON

XVI

Counterclaimant State of Nevada alleges and incorporates Counts I, II and III of the counterclaim as though the same were fully set forth herein.

XVII

As set forth in full in Paragraph III, Article Fourteen, Section 2 of the Nevada Constitution establishes the western boundary of Nevada between the Thirty-Ninth and Forty-second degrees of North Latitude as the Forty-third meridian west of Washington. Article Fourteen, Section 1 of the Nevada Constitution, which was approved by United States Statutes at Large, Vol. 13, Ch. 36, p. 30 and Proclamation No. 22, 13 Stats. at Large, App. p. 63, also specifies that the Forty-Third meridian west of Washington is the easterly boundary of California between the Thirty-Ninth and Forty-Second degrees of North Latitude.

XVIII

Article Fourteen, Section 1 of the Nevada Constitution, as approved by Statutes at Large, Vol. 13, Ch. 26, p. 30 and Proclamation No. 22, 13 Statutes at Large, App. p. 63, constitutes the last enacted or adopted expression of the Congress and Executive of the United States and as such is controlling as to the boundary between the States of Nevada and California.

WHEREFORE, COUNTERCLAIMANT STATE OF NEVADA PRAYS AS FOLLOWS:

1. That the boundary between the State of Nevada and the State of California be declared to be the 1863 "Houghton-B. Ives" line from its intersection with the Forty Second degree of North Latitude to the intersection with the Thirty Ninth degree of North Latitude; thence along the line marked on the ground by the "Houghton-B. Ives" survey in 1863 to the terminal point thereof; thence continuing on a line to the point established by the 1961 -1966 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

2. If the Court should determine that the 1863 "Houghton-B. Ives" line is not the legal boundary, that the boundary between the State of Nevada and the State of California be declared to be a line established by running a true Meridian South from the Northeast corner of the State of California as established by Daniel G. Major in 1868 to said true Meridian's intersection with the Thirty Ninth degree of North Latitude and thence

on a line to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude in the Colorado River.

3. If neither of the two lines prayed for above be determined to be the legal boundary, that the boundary between the State of Nevada and the State of California be held to be the entire "Von Schmidt" line from its beginning at the Forty Second degree of north latitude to its termination at the Colorado River; thence extending easterly to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

4. If the prayers set forth in 1-3 above not be granted, then that the line presently recognized on the ground as the boundary between the States of Nevada and California be adjudged the legal boundary between California and Nevada by acquiescence.

5. If none of the prayers specified above are granted, and a new survey is ordered, that any such survey be a survey of the Forty-Third meridian of longitude west of Washington from the Forty-Necond degree of North Latitude to its intersection with the Thirty-Ninth degree North Latitude, thence southeasterly from such point of intersection to the point established by the 1961-1966 Compacts as the intersection of the Thirty-Fifth degree of North Latitude with the Colorado River.

6. For costs incurred by defendant and counterclaimant herein; and

7. For such other and further relief as the Court may deem proper.

Dated this 19 day of July, 1978.

ROBERT FRANK LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By _____
Robert Frank List
Attorney General of the
State of Nevada

Capitol Complex
Carson City, Nevada 89710

CERTIFICATE OF SERVICE

I, ROBERT FRANK LIST, Attorney General of Nevada, hereby certify that on the 19 day of July, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

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Governor of California
State Capitol Building
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Evelle J. Younger
Attorney General of California
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Attorney General of
Nevada

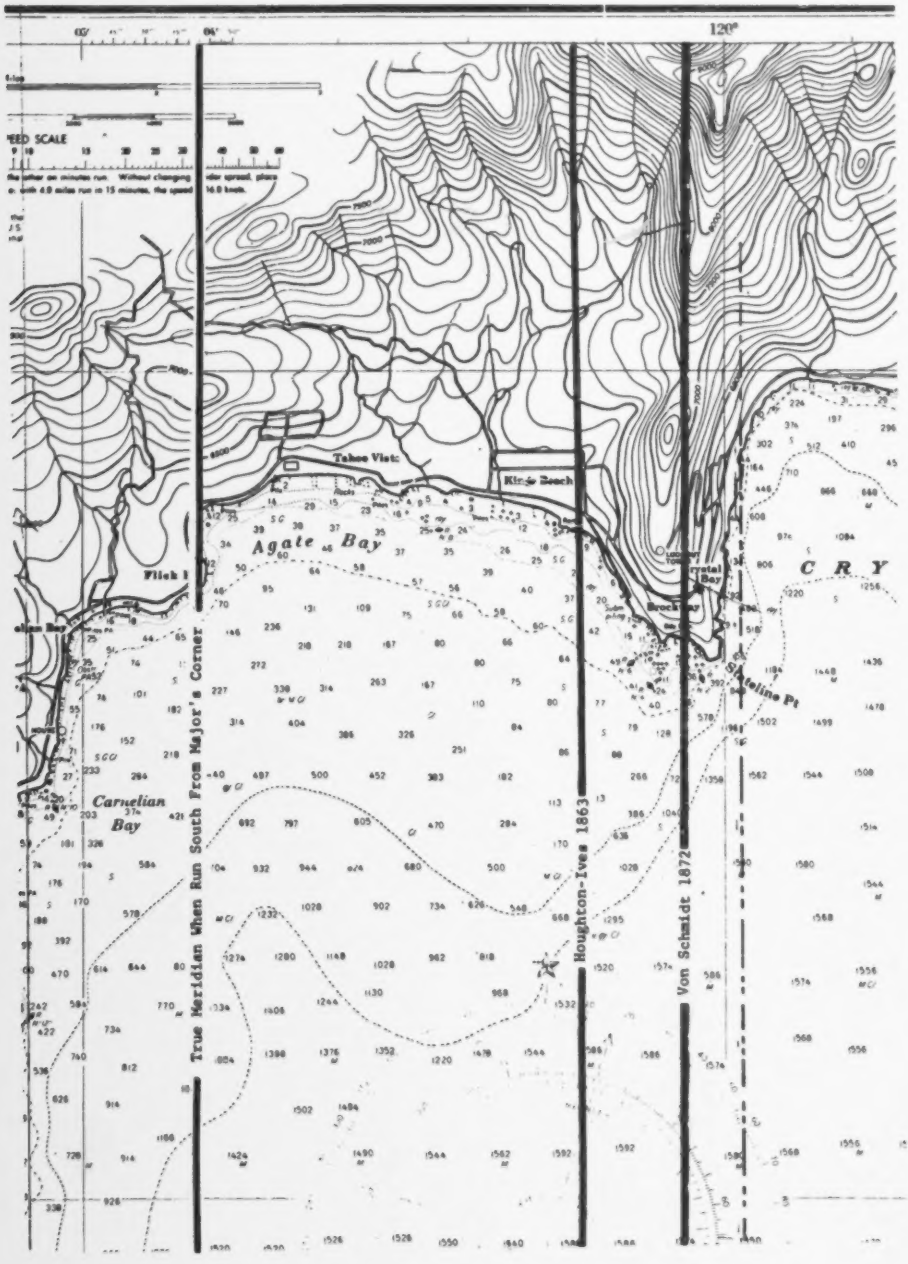

EXHIBIT "A" TO ANSWER

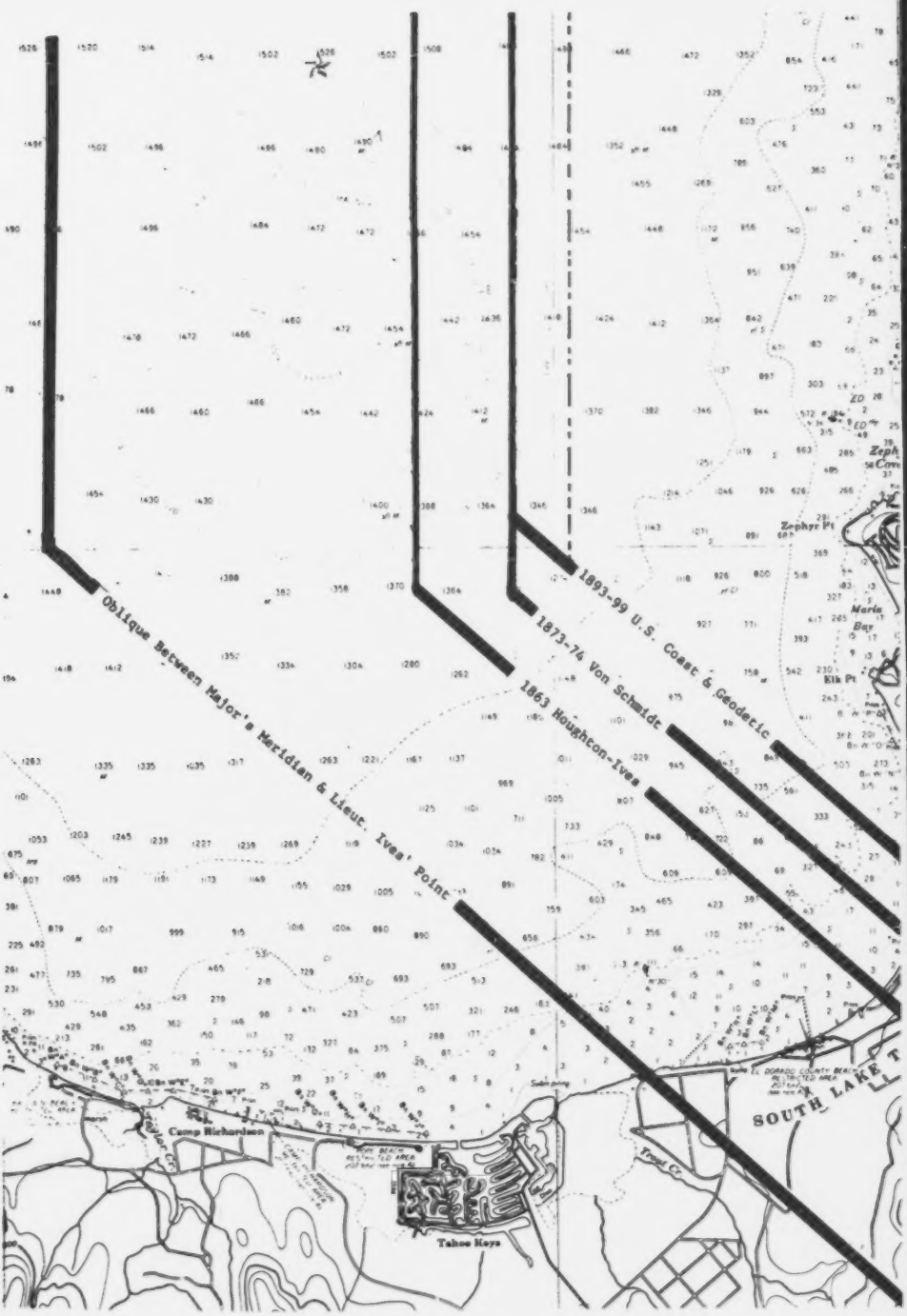

EXHIBIT "3" TO ANSWER

EXHIBIT "C" TO COUNTERCLAIM

EXHIBIT "D" TO COUNTERCLAIM

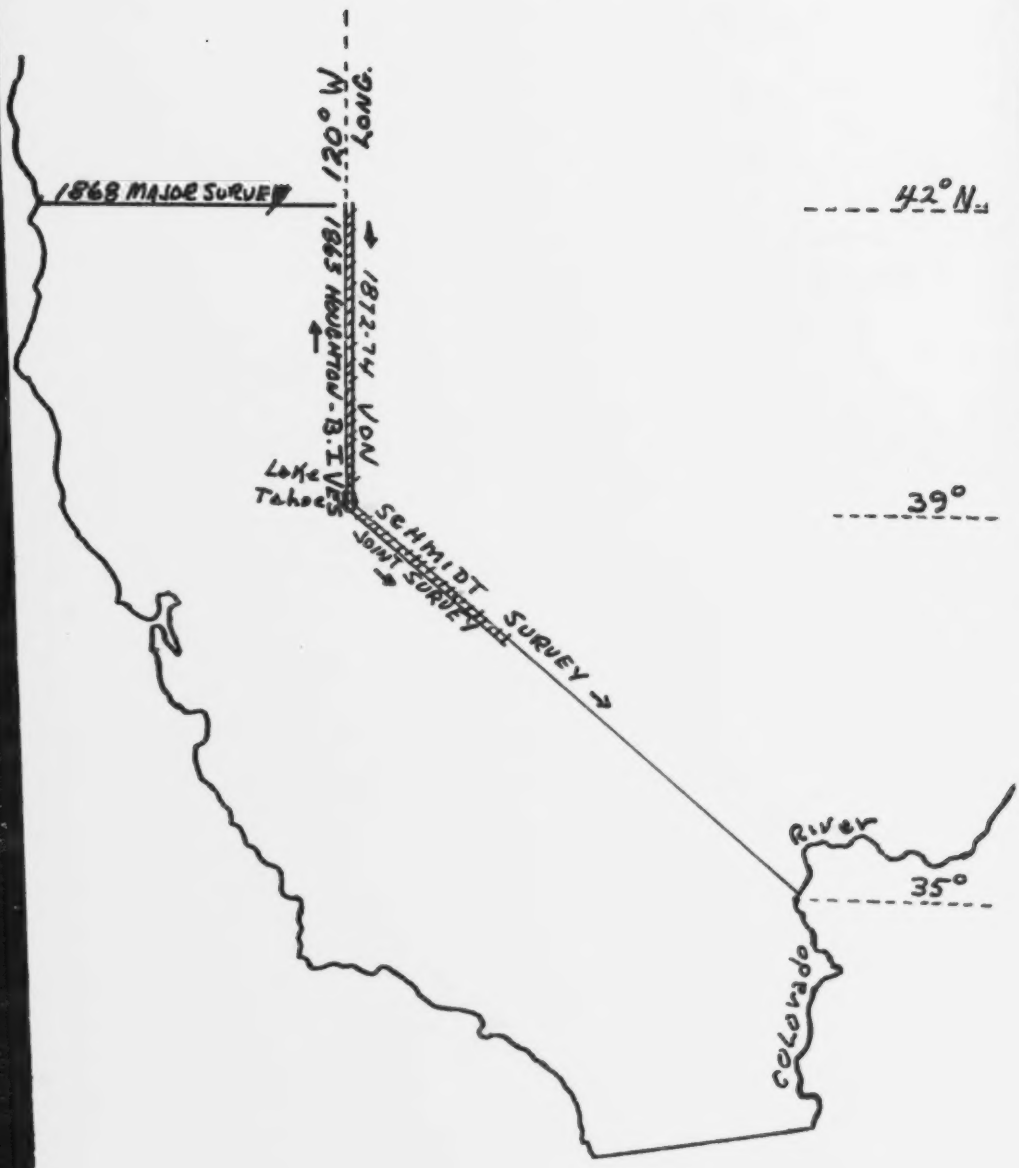

EXHIBIT "E" TO COUNTERCLAIM

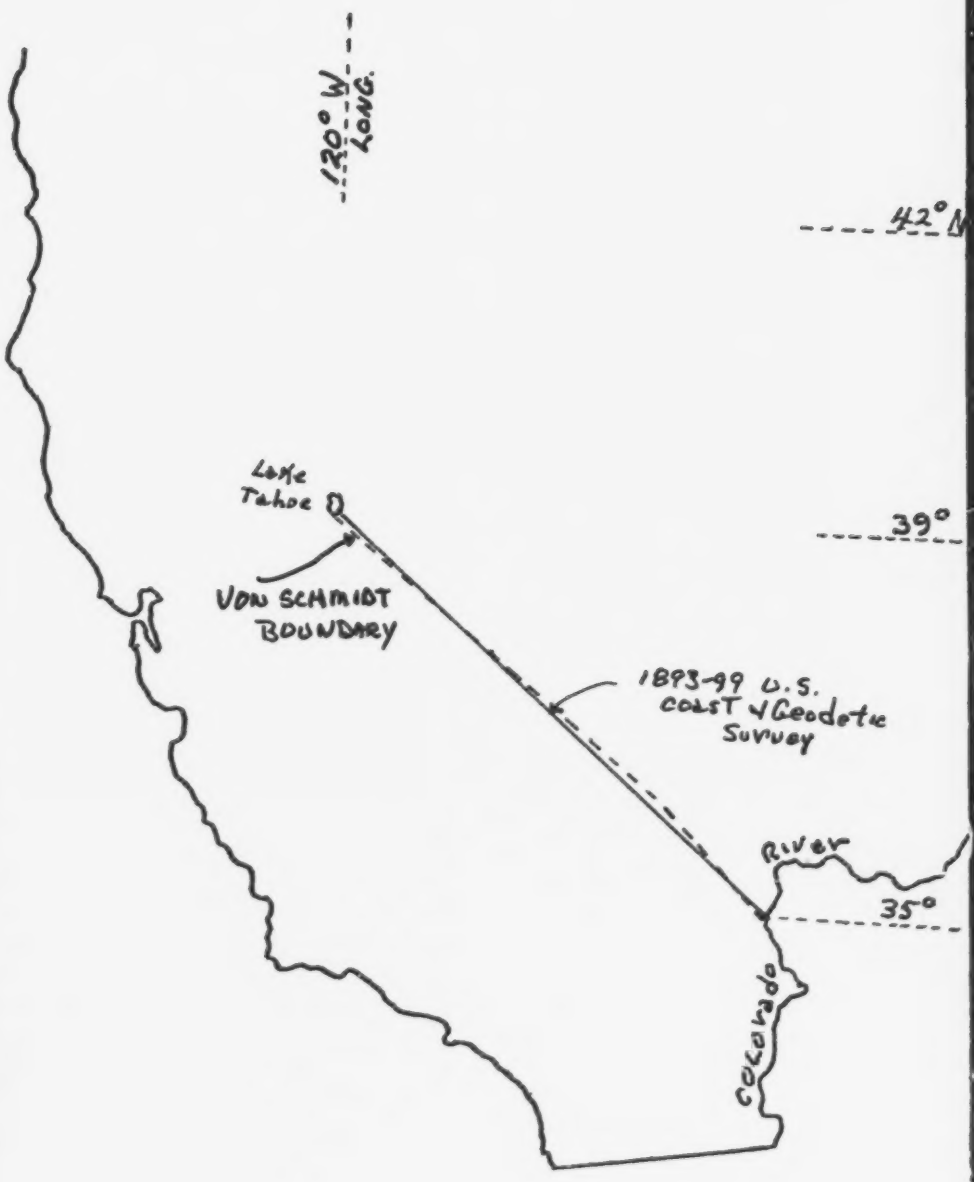

EXHIBIT "F" TO COUNTERCLAIM

Supreme Court, U. S.
FILED
JUL 20 1978
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF NEVADA,
Defendant.

Reply to Counterclaim

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF NEVADA,
Defendant.

Reply to Counterclaim

Plaintiff State of California answers the counterclaim in this action as follows:

COUNT I

CLAIM FOR HOUGHTON-B. IVES BOUNDARY

I.

Answering paragraph I, plaintiff admits that a survey was made of that portion of the boundary line between Nevada and California from the Oregon border to the 39th degree of north latitude pursuant to agreement of the State of California and the Territory of Nevada in 1863; that said survey was conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner appointed by the Territory of Nevada; and that the resultant line was recognized by the California and Nevada Legis-

latures as the boundary line between the states as set forth in the statutes cited therein. Plaintiff affirmatively alleges that notwithstanding adoption of statutes referring to the "Houghton-B. Ives" line by the California and Nevada Legislatures in 1864 and 1865 respectively, that line has neither been used nor recognized by either state since 1872.

II.

Answering paragraph II, Plaintiff admits the allegations thereof except as follows: Plaintiff denies that J. C. Ives ever established a point as the intersection of the 35th degree north latitude with the Colorado River; rather, he identified but failed to monument such a point. Plaintiff further alleges affirmatively that (1) the point identified by J. C. Ives was never recognized or accepted in any survey of the California/Nevada boundary; (2) the United States Coast and Geodetic Survey identified a different point (hereinafter referred to as the "U. S. C. & G. S. point") which has been used as the intersection of the 35th degree north latitude with the Colorado River since it was set in 1899; (3) ever since 1899 said U. S. C. & G. S. point has been monumented on both sides of the river; (4) said U. S. C. & G. S. point has been recognized and acquiesced in by the States of California, Nevada and Arizona since 1900; (5) said U. S. C. & G. S. point was used in the compacts between Arizona-Nevada and Arizona and California referred to by counterclaimant; and (6) said U. S. C. & G. S. point is the most accurate designation of the intersection of the 35th degree north latitude with the Colorado River. The location of said points are more fully identified in exhibits "A" and "B" herein, being true and accurate copies of the illustrations set forth in the 1900 report of the United States Coast and Geodetic Survey, "Oblique Boundary Line Between California and Nevada," Government Printing Office, 1901.

III.

Answering paragraph III, plaintiff realleges and incorporates herein by reference each and every admission, denial and allegation contained in paragraph II set forth above with respect to identification by Lieutenant J. C. Ives of the intersection of the 35th degree of north latitude with the Colorado River. Plaintiff further denies that that portion of the "Houghton-B. Ives" line extending from its intersection with the 39th degree of north latitude to the south shore of Lake Tahoe was ever monumented in any way. Plaintiff admits each and every remaining allegation therein.

IV.

Answering paragraph IV, plaintiff admits each and every allegation therein, except as follows: Plaintiff denies that the Houghton-B. Ives line should be extended to the intersection of the 35th degree of north latitude with the Colorado River and alleges affirmatively that (1) the Houghton-B. Ives line was never extended beyond approximately 100 miles south of Lake Tahoe; (2) that portion of said line extending south of the 39th degree of north latitude was never recognized in fact or law by either state as the California-Nevada boundary; and (3) the point of intersection of the 35th degree north latitude at the Colorado River described in paragraph IV as being common to the boundaries of Arizona, California and Nevada is the one set by the United States Coast and Geodetic Survey in 1899, as more fully described in paragraph II above.

V.

Answering paragraph V, plaintiff admits each and every allegation therein, except as follows: Plaintiff denies that Allexey W. Von Schmidt "physically moved" the boundary

between the State of California and the State of Nevada and alleges affirmatively that a boundary is a legal concept incapable of being physically moved. Plaintiff further alleges upon information and belief that certain stone monuments purporting to designate the California-Nevada boundary at the north and south ends of Lake Tahoe were moved on or about the time of the Von Schmidt survey. Plaintiff is without knowledge or information sufficient to form a belief as to the identification of the person or persons who moved such monuments, and basing its denial on that ground, denies each and every allegation made with respect to Alexey W. Von Schmidt's actions with regard thereto.

VI.

Answering paragraph VI, plaintiff denies each and every allegation therein.

VII.

Answering paragraph VII, plaintiff denies each and every allegation therein.

COUNT II

ALTERNATIVE CLAIM FOR BOUNDARY FROM MAJOR'S CORNER TO THE COLORADO RIVER

VIII.

Answering paragraph VIII, plaintiff State of California realleges and incorporates by reference each and every admission, allegation and denial contained in its answer to count I of the counterclaim herein.

IX.

Answering paragraph IX, plaintiff admits that Daniel G. Major set a point purporting to be the northeastern corner of California and monumented said point in 1868; and that the monument set by Major remains standing intact. Plain-

tiff denies that the point set by Major was located at the intersection of the 120th meridian with the 42nd degree of north latitude, and further denies that the California-Nevada boundary was conclusively established thereby. Plaintiff affirmatively alleges that the point set by Major was, in fact, never relied on in any recognized survey of the California-Nevada boundary.

X.

Answering paragraph X, plaintiff denies each and every allegation therein.

XI.

Answering paragraph XI, plaintiff denies each and every allegation therein.

COUNT III

ALTERNATIVE CLAIM FOR THE "VON SCHMIDT" BOUNDARY IN ITS ENTIRETY

XII.

Answering paragraph XII, plaintiff State of California realleges and incorporates each and every admission, allegation and denial set forth in answer to counts I and II of the counterclaim set forth above.

XIII.

Answering paragraph XIII, plaintiff admits that the boundary between California and Nevada from the 39th degree of north latitude to the Oregon border was first established by Allexey W. Von Schmidt in the years 1872-1874. Plaintiff further admits that a survey purporting to fix the California-Nevada boundary from the 39th degree of north latitude southeastward to the intersection of the 35th degree of north latitude and the Colorado River (hereinafter referred to as the "oblique boundary") was made by

Allexey W. Von Schmidt in 1872-1874. Plaintiff denies that the said line extending southeastward from the 39th degree of north latitude to the Colorado River was in fact a true survey of the California-Nevada boundary and alleges affirmatively that (1) said line was only observed for a short period from approximately 1874-1899; (2) from its inception, it was recognized as being inaccurate; (3) subsequently, that boundary was marked, surveyed and monumented on the ground by the United States Coast and Geodetic Survey in the period 1893-1899; and (4) the United States Coast and Geodetic Survey line extending from Lake Tahoe to the Colorado River has been recognized by statute and acquiesced in by both the States of California and Nevada and their citizens since it was established and monumented in 1893.

XIV.

Answering paragraph XIV, plaintiff admits that the United States government, at the request of the State of California, undertook a new survey of the oblique boundary between California and Nevada between Lake Tahoe and the Colorado River. Plaintiff denies that the previous Von Schmidt line was "physically moved." Plaintiff is without knowledge or information sufficient to form a belief as to the truth of counterclaimant's allegation that such action was taken without the prior and express consent of the State of Nevada; and basing its denial on that ground, denies said allegation. Plaintiff affirmatively alleges that said survey was done with the implied consent of the State of Nevada and that the State of Nevada has acquiesced in and recognized said line since its inception in 1899. Plaintiff further alleges that (1) the State of California accepted said line by statute in 1901 (Cal. Stats. 1901, ch. 73, p. 89); said statute

has never been amended or repealed and remains in effect today; and California has exercised jurisdiction over all lands west of said line ever since 1900 without objection from the State of Nevada; (2) the State of Nevada accepted said line in 1903 by a statute which has never been amended or repealed and remains in effect unchanged today (Nev. Stats. 1903, ch. 15, p. 38).

XV.

Answering paragraph XV, plaintiff denies each and every allegation thereof.

XVI.

FIRST AFFIRMATIVE DEFENSE

By way of affirmative defense, plaintiff alleges that the line set by the United States Coast and Geodetic Survey in 1893-1900 establishing the oblique boundary between California and Nevada from the 39th degree north latitude southeastward to the intersection of the 35th degree of north latitude and the Colorado River accurately sets forth the boundary between those states; that said line has been acquiesced in since 1900 by both California and Nevada in the exercise of civil and criminal jurisdiction and in taxing and establishment of districts of all kinds; that it has been recognized since 1900 as the boundary between those states since its establishment; and that it has been recognized by the United States since 1900 in the exercise of civil and criminal jurisdiction, in the administration of the public lands, and in all other respects.

XVII.

SECOND AFFIRMATIVE DEFENSE

For a further and separate affirmative defense, plaintiff alleges that defendant had notice of all the facts set forth in its amended answer and counterclaim since the surveys

complained of were made and monumented in the years 1893-1900 and nevertheless has refrained from asserting its counterclaim until April 21, 1978. From 1900 to the present time, plaintiff State of California and its citizens selected public lands, obtained patents, constructed buildings and residences, collected taxes, and generally exercised civil and criminal jurisdiction in reliance upon the line set by the United States Coast and Geodetic Survey in the years 1893-1900. Defendant has thereby been guilty of laches and should be barred from maintaining this counterclaim.

WHEREFORE, plaintiff prays:

1. That a decree be entered adjudging the eastern boundary of California between the 39th and 42nd degrees north latitude to be the line surveyed and monumented by Allexey W. Von Schmidt in 1872-1874, commonly known as the "Von Schmidt line";

2. That in the alternative, should the Court not adjudge the eastern boundary of California between the 39th and 42nd degrees latitude to be the "Von Schmidt line," a new survey be ordered by the Court to determine the true location of the meridian 120 degrees of longitude west from Greenwich between the 39th and 42nd degrees of north latitude;

3. That this Court enter a decree adjudging the eastern boundary of the State of California from the intersection of the 39th degree of north latitude with the 120th degree of longitude west from Greenwich to the intersection of the 35th degree north latitude and the Colorado River to be the line surveyed, established and marked by the United States Coast and Geodetic Survey as completed in 1900;

4. That a decree be entered adjudging that the State of Nevada has no right, title or interest by virtue of its sovereignty in any lands west of the "Von Schmidt line"

between the 39th and 42nd degrees north latitude and perpetually enjoining the defendant from asserting any right or interest to said land or any part thereof and from interfering with possession of California in said land;

5. That a decree be entered adjudging that the State of Nevada has no right, title or interest by virtue of its sovereignty to any lands west of the line established and marked by the United States Coast and Geodetic Survey as completed in 1900 from the intersection of the 39th degree of north latitude with the 120th degree of longitude west of Greenwich to the intersection of the 35th degree north latitude and the Colorado River, and perpetually enjoining the defendant from asserting any right, title or interest to said land or any part thereof or from interfering with possession of California in said land;

6. That in the alternative, should the Court not adjudge the eastern boundary of California between the intersection of the 39th degree north latitude with the 120th degree of longitude west from Greenwich to the intersection of the 35th degree of north latitude and the Colorado River as established and marked by the United States Coast and Geodetic Survey completed in 1900 to be the lawful eastern boundary of California, a new survey be ordered by the Court to determine the true location of such boundary and that a decree be entered adjudging the line determined by such Court-ordered survey to be the eastern boundary of California between the intersection of the 39th degree of north latitude with the 120th degree of longitude from Greenwich to the intersection of the 35th degree of north latitude and the Colorado River;

7. That defendant recover nothing from its counterclaim herein;

8. For plaintiff's costs of suit herein; and
9. For such other and further relief as may be proper.

DATED: July 19, 1978.

EVELLE J. YOUNGER
Attorney General of the
State of California

N. GREGORY TAYLOR
JAN S. STEVENS
Assistant Attorneys General

ALLAN J. GOODMAN
MARGARET RODDA
DAVID B. JUDSON
Deputy Attorneys General
Counsel for Plaintiff,
State of California

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

DEFENDANT'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Robert F. List
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Capitol Complex
Carson City, Nevada 89710

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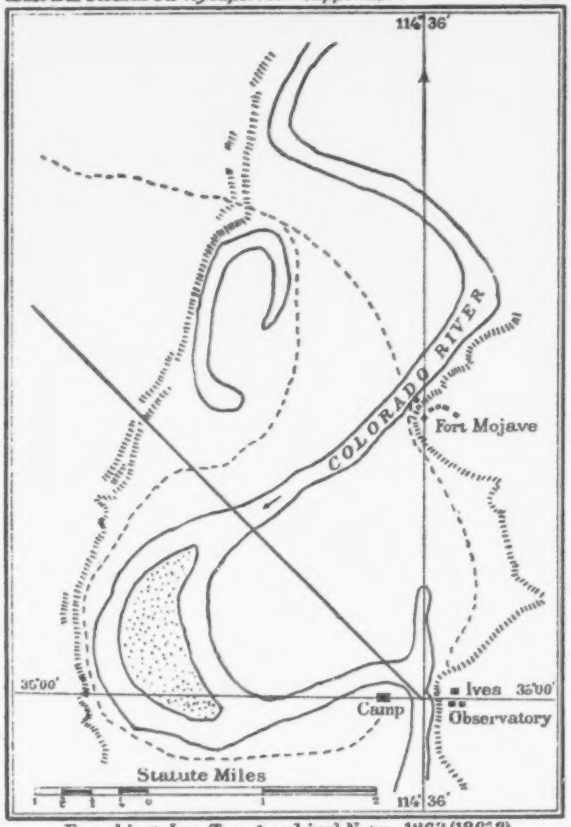
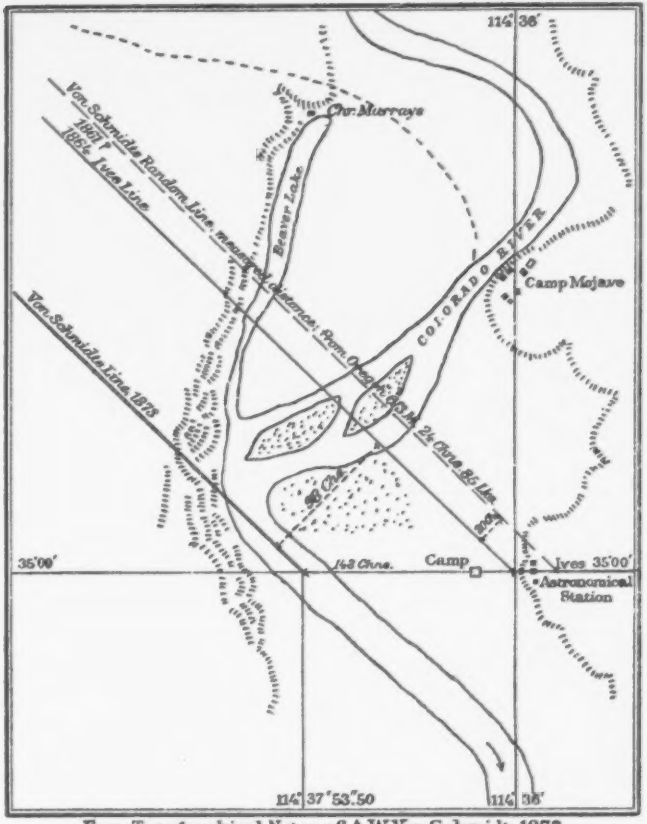
No.4



From Lieut. Ives Topographical Notes, 1863 (1861?)

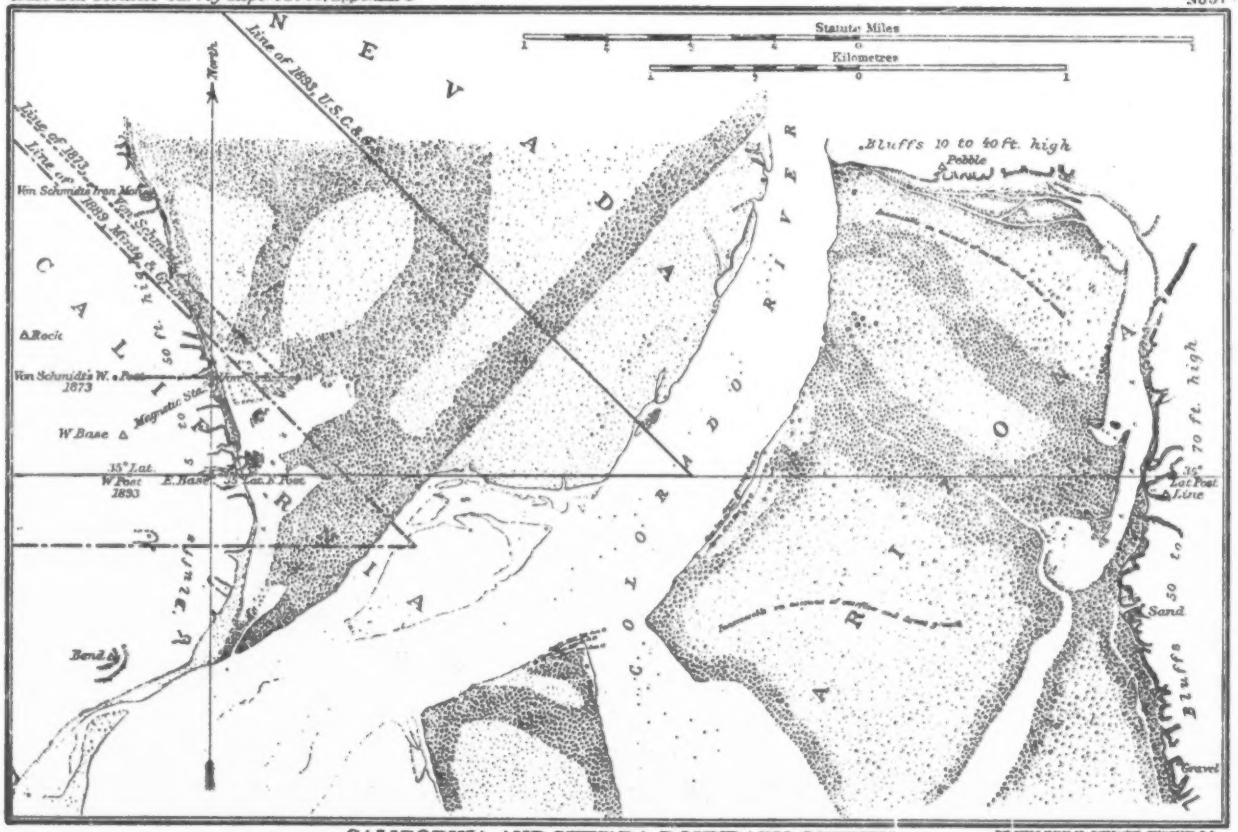
No.5



From Topographical Notes of A.W Von Schmidt, 1873

THE HORNE-ANTON CO. PHOTO-LITHO. WASHINGTON, D. C.

EXHIBIT A



CALIFORNIA AND NEVADA BOUNDARY SURVEY

THE ROBERT PETERS CO., PHOTO-LITHO., WASHINGTON, D. C.

EXHIBIT B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

DEFENDANT'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Defendant hereby files objection to the Motion by California State Assemblyman Mike Cullen for leave to file a brief amicus curiae. Defendant's objection is based on the following reasons:

I.

The ultimate issue joined by the complaint and answer in this proceeding is which of two boundary surveys (the 1863 Houghton-Ives line and the

1872 Von Schmidt line) constitutes the legal boundary between California and Nevada.

Movant seeks to inject an issue wholly extraneous to the issue framed by the pleadings, that is, the Court should order a resurvey of the 120th meridian because of "space age" advances in surveying techniques.[1] The pleadings show that both the 1863 and the 1872 surveys were surveys of the 120th meridian.

Movant clearly fails to satisfy the requirement of Rule 42.3 that the applicant demonstrate facts or questions of law relevant "to the disposition of the case." Indeed, a resurvey or the need for a resurvey is irrelevant to the issue of which of the prior surveys of the 120th meridian is the legal boundary.

II.

Movant's attempt to inject an entirely new issue of law into this proceeding runs afoul of the well established practice of the courts that an amicus

---

[1] Parenthetically, if movant's view be correct, then all meridional boundaries between states of the Union are wrongly located and in need of resurveying by "space-age technology."

curiae must accept the case before the Court with the issues joined by the parties.[2]

For the reasons stated, the Defendant requests the Court to withhold consent to the application for leave to file Brief Amicus Curiae.

Respectfully submitted,

ROBERT LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By _____
James H. Thompson
Chief Deputy Attorney
General

2/ The numerous decisions applying this rule are collected at Volume 3A, C.J.S., Amicus Curiae, §7, Notes 90, 91.

CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General of Nevada, hereby certify that on the 28 day of February, 1978, I mailed, by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.,
Governor of California
State Capitol Building
Sacramento, California 95814

Evelle J. Younger
Attorney General of California
555 Capitol Mall, Suite 550
Sacramento, California 95814

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James H. Thompson
Chief Deputy Attorney General

Supreme Court, U. S.
FILED
JUN 28 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 73, Original

STATE OF CALIFORNIA, PLAINTIFF,

VS.

STATE OF NEVADA, DEFENDANT.

PRELIMINARY REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U. S. District Judge
Special Master

JOE CHRISTENSEN, INC., 1540 Adams Street, Lincoln, Nebraska

In The

Supreme Court of the United States

October Term, 1976

No. 73, Original

STATE OF CALIFORNIA, PLAINTIFF,

vs.

STATE OF NEVADA, DEFENDANT.

PRELIMINARY REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U. S. District Judge
Special Master

There has been referred to the Special Master (1) the Motion to file a brief amicus curiae, filed by California State Assemblyman Mike Cullen, and the objections thereto of defendant State of Nevada; (2) the Motion for leave to file amended answer setting forth counterclaim, filed by the State of Nevada, and the opposition thereto of the State of California and Nevada's reply thereto; and (3) the Motion filed by the State of California for leave to file amended complaint. The parties have filed briefs and the matters now stand submitted.

They will be discussed in the order above enumerated.

Early in the proceedings Mr. Cullen sent the Special Master a large sized packet of papers. From a scanning it was evident that documents of an evidentiary nature were being tendered and the Special Master advised Mr. Cullen that he felt he should not examine any documents concerning the boundary dispute until identified as exhibits and offered in evidence. Mr. Cullen also on July 13, 1977 called the Special Master on the telephone and talked to his law clerk and asked to be advised as to the date of hearing.

Mr. Cullen appears to believe that his views as a citizen and a State Legislator are not being represented by the Attorney General of California although in California's tendered amended complaint the alternative relief prayed for may be broad enough to cover Mr. Cullen's position. Your Special Master, without at this time passing on the question of whether the Attorney General will adequately represent Mr. Cullen's interest or position, concludes that there is no serious harm in permitting Mr. Cullen by brief to present his view of the facts and law applicable and therefore recommends that Mike Cullen individually and as a State Legislator be permitted within a time to be fixed hereafter by the Special Master Master to present to the Special Master a brief amicus curiae on any relevant issue in this case.

Your Special Master will, after the evidentiary hearing, report and make a recommendation to the Court as to whether any relevant issues appear as to which the Attorney General of the State of California has been unable or unwilling to provide proper representation.

Motions above numbered 2 and 3 can best be considered together. By the motions and tendered pleadings attached it is evident that each State has factual claims and legal arguments which are not within the issues made by the pleadings thus far filed by order of the Supreme Court.

It seems advantageous to all the parties and to the Court to resolve now and in this action all known disputes between the two States, relevant to a determination of the joint or common boundary of the two States.

The parties are now before the court. It does not presently appear that the granting of either motion will necessitate additional parties.

Your Special Master has previously stated to this Court in *Texas v. Louisiana*, Original 36:

> Courts have long recognized the desirability, as far as possible, of settling all disputes of parties before it rather than allowing piecemeal litigation. The Federal Rules of Civil Procedure refer to the consolidation of trials to avoid unnecessary expense and delay and this Court has long approved consolidation of trials as a matter of convenience and economy in administration.

This statement applies with equal force here.

To allow the proposed pleadings should result in a saving of expense to each litigant, to a saving of time for the Court and to a probable saving of time for counsel for each State and for any Special Master, assuming the likelihood and necessity of such a further appointment, if the motions are denied and cases are filed raising at a later time issues which have not been presented in this case.

The issue of whether or not the proposed counterclaim has legal merit, whether it is a compulsory counterclaim and whether if not filed the doctrine of res judicata applies are all matters that can best be determined after hearing the facts supporting and the facts denying the counterclaim. Time will be saved the parties, the Court and the Special Master in hearing the matter at this time.

Even with the filing of an amended complaint and an amended answer setting forth a counterclaim the matter should progress to where it can be submitted to the Court during its October, 1978 term.

The national interests would also be served by a final settlement in this action of all disputes between the parties. The location of a state's boundary has an effect upon interstate commerce, in that some commerce may be intrastate or interstate depending on the boundary location.

While your Special Master is advised that slightly over 100 years ago shots were fired by citizens of the area affected by the boundary location at other area citizens, he is certain no such danger now exists. It is mentioned only because the citizens of the area are still vitally interested in the outcome of this suit. Your Special Master with, and at the request of, counsel made a very superficial examination of a small part of the area affected. This area, while it extends from a point in Lake Tahoe to the Oregon border, is only a few thousand feet in width at most. Your Special Master finds the Attorneys General, and their staffs, cooperative with each other and with your Special Master in the objective of an early hearing and believes it would best serve the Nation's interest to resolve now in this action all known disputes between these two States affecting the lives, welfare, economics, peace and security of the citizens who now are and will remain neighbors, wherever the boundary is finally determined.

Your Special Master therefore recommends:

1) That Mike Cullen, individually and as a State Legislator, at a time to be determined by the Special Master, be permitted to file with the Special Master a brief amicus curiae.

2) Granting of the Motion of the State of Nevada to file forthwith the tendered Amended Answer setting forth a counterclaim and allowing the State of California 20 days thereafter to reply or answer.

3) Allowing the State of California to file forthwith an Amended Complaint as tendered in and attached to its Motion for leave to file and allowing the State of Nevada 20 days thereafter, if needed, to amend its answer, with 10 days to be granted the State of California to reply if a reply is needed.

Respectfully submitted,

ROBERT VAN PELT
Special Master

Supreme Court, U. S.
FILED
OCT 9 1979
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1978

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA

Defendant.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U.S. District Judge
Special Master

JOE CHRISTENSEN, INC., 1540 Adams Street, Lincoln, Nebraska 68521

In the

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REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U.S. District Judge
Special Master

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I. INTRODUCTION

This original action involves the determination of the boundary between the States of California and Nevada. At the north it begins at a point on the south boundary of the State of Oregon approximately where the 42nd parallel intersects the 120th meridian and runs south to the 39th parallel. All parties agree that this intersection is in Lake Tahoe.[1] The boundary then proceeds southeasterly in a straight line to where the 35th parallel intersects the Colorado River. This intersection is now an agreed point and is recognized by compact between the States of California, Nevada and Arizona.[2] Thus the meridian line, sometimes called the north and south line, and the oblique line together constitute the entire common boundary between the two states.

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1 In reviewing the early maps and other documents, the Court will observe that Lake Tahoe has been known in the past under various names.

It was first discovered by Capt. John Charles Fremont on February 14, 1844 and he named it Mountain Lake. He later changed the name to Lake Bonpland in honor of Aimé Bonpland, a French botanist. In 1853 the lake was named Lake Bigler in honor of California's third governor, who served from 1852-56. However, during the Civil War, Bigler supported the Confederacy and was an outspoken secessionist. A movement was started to change the name of the lake. The name Tahoe was used as early as 1862 and is derived from the Washoe Indian language. Various Washoe words have been thought to be the source of the name, such as taa-oo meaning big water, tah-oo meaning lake water or sheet of water, and tah-oo-ee meaning much water. See E. GUDDE, CALIFORNIA PLACE NAMES 328-9 (3D REV. ED. 1969); P. HANNA, THE DICTIONARY OF CALIFORNIA LAND NAMES 324 (2d ed. 1951). These books were not offered in evidence. They are referred to here only insofar as they pertain to the naming of the lake.

2 See Exhibits 185, 180/PP, and 184/JJ dealing with the California-Arizona compact and Exhibits 179 and 181/GG dealing with the Arizona-Nevada compact.

Jurisdiction is invoked under Article III, Section 2, clause 2 of the Constitution of the United States. Both parties admit this Court's original jurisdiction in this case. Your Special Master is of opinion, and reports, that this Court has jurisdiction.

Assemblyman Mike Cullen, a member of the California Legislature, requested leave to file a brief *amicus curiae*, which was granted by the Supreme Court. Later Mr. Cullen concluded that the Attorney General of California was sufficiently presenting his contentions and that it was unnecessary for him to file a brief.

Rubin, Miller & Eagan, a professional corporation of Beverly Hills, California, with the approval of the Attorney General of California dated November 25, 1978, and the approval of the Attorney General of Nevada dated November 29, 1978, was permitted by your Special Master to file an *amicus curiae* brief on behalf of the California Land Title Association. Messrs. Rubin and Eagan attended the hearing in January, 1979. Thereafter, on June 25, 1979, their *amicus curiae* brief was filed.

II. THE PLEADINGS

On April 22, 1977, the State of California filed *in* this Court its Motion for Leave to File Complaint and Complaint, to which a response was made by the State of Nevada on May 20. On June 29, 1977, this Court granted leave to file bill of complaint and appointed the undersigned Special Master. The oath of the Special Master was filed July 11. An Answer to the Complaint was filed by Nevada on August 26, 1977.

On August 22 and 23, 1977, a preliminary conference was held at Reno, Nevada, attended by the Special Master and by representatives of the Attorney General of each state. A second conference was held on November 1 and 2, 1978 at Sacramento, California, attended by representatives of the Attorney General of each state, by Messrs. Rubin and Eagan, above mentioned, and by Mr. Cullen. At this conference the trial was set for January 3, 1979.

The first set of interrogatories was propounded in December, 1977. Thereafter other interrogatories were propounded and requests for admission filed by each party and depositions were taken until shortly before the hearing of January, 1979.

In 1978, after Nevada asked leave to file an Amended Answer and Counterclaim, California asked leave to file an Amended Complaint. These matters, and the request of Cullen to file an *amicus curiae* brief, were referred to the Special Master. The report thereon recommending allowance of the proposed filings was adopted in July, 1978 and the motions were granted. Thereafter, the Complaint was amended by California and an Answer to the Amended Complaint and Counter-

claim was filed by Nevada. California filed a Reply to Counterclaim. The originals of all these pleadings are on file with the Clerk of the United States Supreme Court. Your Special Master concludes that it would unduly prolong this report, and would not serve any relevant purpose, to set forth the issues made in the original complaint and answer and hereafter outlines only the issues contained in the amended pleadings.

Plaintiff sets forth the boundaries of each state as described in their respective constitutions and makes reference to armed conflict between plaintiff and the Territory of Nevada in 1863; plaintiff alleges the establishment by survey of the "Houghton-Ives" line and its adoption by the California Legislature in 1864 and by the Nevada Legislature in 1865 and claims that the line was observed by California from 1864 to 1872 and by Nevada from 1865 to 1872. California next alleges the making of the Allexey W. Von Schmidt survey, which hereafter will be referred to as the "Von Schmidt" line. California alleges that since 1872 in the provision of governmental services, assessments and taxing practices and in the exercise of civil and criminal jurisdiction both states have recognized and observed this line, and by acquiescence it constitutes the lawful boundary between the states.

Plaintiff prays that the Court adjudge the "Von Schmidt" line between the 39th and 42nd parallels to be the eastern boundary of California; that it decree that Nevada has no right, title or interest to lands to the west of the "Von Schmidt" line and perpetually enjoin Nevada's assertion of any right, title or interest to such land and its interference with California's possession and, in the alternative,

that a resurvey be had to determine the true location of the meridian of one hundred twenty degrees of longitude west from Greenwich between the thirty-ninth and forth-second parallels of north latitude, for costs, and for such other and further relief as may be proper.

Nevada by its answer and counterclaim makes certain admissions which will be discussed hereafter in the report and sets forth Nevada's boundaries as described in the act of admission to the Union. It is to be observed that the Nevada Constitution, instead of referring to the one hundred twentieth degree of longitude west from Greenwich, as used in the California Constitution, refers to the 43rd degree of longitude west from Washington.[3]

---

3 On September 28, 1850, Congress passed an act directing that:

> [H]ereafter the meridian of the observatory at Washington shall be adopted and used as the American meridian for all astronomical purposes, and that the meridian of Greenwich shall be adopted for all nautical purposes.

Exhibits 186 and K. According to an article in a U. S. Coast and Geodetic Survey publication, Exhibit 200 at 58, representatives of 26 countries met in Washington in 1884 to recognize a common meridian, and the meridian so adopted was the Greenwich meridian. Congress in 1911 repealed the act designating the American meridian. Exhibit 201.

There are many indications that the Greenwich and American meridians were for a time thought to be identical. For example, J. Wells Kelly's *First Directory of Nevada Territory* (1862) begins with a historical sketch of Nevada territory, stating:

> The Territory of Nevada was created by Congress from the western portion of Utah, by an Act approved March second, eighteen hundred and sixty-one. It is bounded by the thirty-seventh and forty-second degrees of north latitude, and by the thirty-ninth and forty-third degrees of longitude west from Washington; or, adopting the more usual mode of computing longitude, by the one hundred and sixteenth and one hundred and twentieth meridians west from Greenwich.

In Count I of its counterclaim Nevada urges adoption of the "Houghton-B. Ives" line,[4] and claims that the action of Von Schmidt in physically moving Nevada's boundary without its prior and express consent is unconstitutional. Nevada presents an alternative claim in Count II of its counterclaim for the establishment of the boundary from "Major's Corner" to the Colorado River,

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Exhibit 191. DeGroot's map of Nevada Territory published in 1863 shows the two meridians as being identical, and the reports of the Nevada Surveyor General from 1865 through 1886 indicate the Greenwich and American meridians are identical. Exhibits 189, 190 and 194 through 198.

However, it later was discovered that the Washington observatory was not exactly on the 77th degree west of Greenwich, but 77° 03′ 02″.3 west of Greenwich. Exhibit 200. As stated in Francis Landrum's article in the Oregon Historical Quarterly, Exhibit PPPP, at 8-9:

> The minutes and seconds of arc—03′ 02″.3—have become an important quantity because this is an increment which prevents a congruency between integral degrees of longitude called out with the meridians of Greenwich and Washington as bases. Any legal description of boundaries which attempts to coincide the two meridians with an integral 77° difference will display an overlap of 03′ 02.3″ [*sic*] of arc—nearly 2.6 miles in latitude 42°—perhaps not much as states are concerned, but quite a large amount when translated into privately held real estate.

For further detail on other Washington meridians, see Exhibit 200. It is Nevada's contention that the two meridians were never intended to be identical. The Constitution of Nevada, as set forth in paragraph 3 of Nevada's Answer to Amended Complaint, and as shown by other exhibits, reads:

> . . .thence in a North Westerly direction along said Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington; Thence North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California to the forty second degree of North Latitude. . .

Your Special Master concludes that in the establishment of Nevada's boundary it was believed that the 43rd meridian west from Washington and the 120th meridian west from Greenwich were the same.

[4] Your Special Master concludes that this line is the same as the Houghton-Ives line mentioned by California.

and presents another alternative claim in Count III of its counterclaim for the Von Schmidt boundary in its entirety and presents still another alternative claim in Count IV of its counterclaim for a new survey of the 43rd degree of longitude west from Washington.

Nevada's prayer is in the alternative (1) for the establishment of the "Houghton-B. Ives" line, (2) for the establishment of a line from "Major's Corner", (3) for the establishment of the "Von Schmidt" line in its entirety, (4) for recognition of the present boundary between the two states as the legal boundary by acquiescence; and (5) if all of the above claims are denied, that a new survey be ordered of the 43rd meridian west from Washington and of the oblique line; and prays for costs and for such other and further relief as to the Court may be proper.

California's reply is mainly a denial. Its first affirmative defense alleges that the line set by the U.S. Coast and Geodetic Survey in 1893-1900 establishing the oblique boundary between California and Nevada has been acquiesced in by both states and has been recognized by the United States since 1900. For the second affirmative defense California claims laches on the part of Nevada barring its counterclaim and in effect asks that the "Von Schmidt" line be determined as the boundary between the 39th and 42nd parallels and that the oblique line as marked by the U.S. Coast and Geodetic Survey be determined to be the boundary from the 39th to the 35th parallel. California asks that it be adjudged that Nevada has no right, title or interest in any lands west of the "Von Schmidt" meridian line or west of the U.S. Coast and Geodetic Survey oblique line and enjoining

Nevada from asserting any right or interest therein or interfering with the possession of California, and as its final alternative asks that a new survey be ordered. It repeats other parts of the prayer of the amended complaint, including the prayer for such other relief as may be proper.

The pleadings have been set forth in this detail in order to fully present the parties' contentions and the background of this litigation.

There are certain admissions in the pleadings which bear upon the issues discussed in this report. Nevada, by its Answer to Amended Complaint and Counterclaim, hereinafter referred to as Filing 12, has admitted the following:

1. California's admission into the Union and its boundary, as approved by the Congress and contained in its 1849 Constitution insofar as it relates to the one hundred twentieth meridian of longitude west from Greenwich between the thirty-ninth and forty-second degrees north latitude.
2. The admission to the Union of the State of Nevada and the approval of the Nevada Constitution which provides in part that the western boundary of Nevada shall be the eastern boundary of California and then provides for such territory lying west of this boundary line which California may relinquish to the Territory or State of Nevada, shall constitute a part of the State.
3. The armed conflict in 1863 which arose from a boundary dispute, and which resulted in the joint survey conducted by California Surveyor-General J.S. Houghton and the Commissioner for the Territory of Nevada, Butler

Ives, and the survey and establishment of the line referred to as the "Houghton-Ives" line.

4. California's observance of the "Houghton-Ives" line between 1864 and 1872.

5. Nevada's observance of the "Houghton-Ives" line between 1865 and 1872.

6. That in 1872 the U.S. Government through its General Land Office contracted with Allexey Von Schmidt to survey, post, and monument the one hundred twentieth meridian between the forty-second and thirty-ninth degrees of north latitude; that the "Von Schmidt" line was surveyed, posted and monumented and that it varies in location from the "Houghton-Ives" line. It is also admitted that since 1873 both states have exercised and continue to exercise political jurisdiction and sovereignty up to the "Von Schmidt" line as presently marked on the ground, but Nevada denies that it constitutes the lawful boundary between the states by acquiescence.

7. That California has exercised jurisdiction to the "Von Schmidt" line between the forty-second and thirty-ninth parallels of north latitude as currently marked on the ground since 1873. Nevada denies it has acquiesced in California's exercise of sovereignty or jurisdiction.

8. That the propriety of the "Von Schmidt" line has been drawn into question from time to time by various governmental reports, but that neither Nevada nor California have requested a resurvey of the north-south "Von Schmidt" line.

California, by its Reply to Counterclaim, hereinafter referred to as filing 13, has admitted the following:

1. That a line was jointly surveyed between the 42nd and 39th parallels of north latitude by Houghton-Ives and that the resulting line was recognized by statute in both states including reenactment as California Government Code Section 160 in 1943 Cal. Stats. 1943, Chap. 134, p. 896.
2. Congressional recognition of a compact between Arizona and Nevada, and Arizona and California, establishing the point of intersection of the 35th degree of north latitude with the Colorado River.
3. That there was a survey conducted by Allexey Von Schmidt in 1872 of the boundary between the 42nd and 39th parallels of north latitude.
4. That Daniel G. Major set a point purporting to be the northeast corner of California and monumented said point in 1868 and that the monument set by Major remains standing intact.
5. That Von Schmidt surveyed both the meridian and the oblique boundary lines, and admits that the United States government at the request of California conducted a new survey of the oblique boundary line during the period of 1893-99.

In addition to the pleadings and other filings previously mentioned, all of which were submitted prior to the hearing of this case at Reno in January of 1979, there was filed by California on May 11, 1979, a Motion to File Second Amended Complaint

and to Bifurcate Issues. This Motion was filed at the same time that California filed its Opening Brief.

California's Motion contains a general statement of the problems to be encountered regardless of which of the many lines proposed is ultimately determined to be the legal boundary between California and Nevada.

> "Research and discovery in the course of this proceeding has led to the conclusion that regardless of where California's eastern boundary is eventually placed, serious questions will remain as to the validity of thousands of acres of state school lands and internal improvement grants granted by the United States to California and Nevada. If, as some past decisions of this Court and the interpretation of the Department of the Interior suggest, that agency unlawfully confirmed or clear-listed large parcels of land to states not entitled to them, its actions—and patents subsequently issued to innocent purchasers—may be invalid. The United States may, therefore, have an interest in lands heretofore assumed to be in the ownership of California, Nevada, or their successors in interest."

California alleges:

1. That a determination of ownership interests between California, Nevada, and the United States is essential to a final and equitable conclusion of this litigation; and

2. That the Court should make an order bifurcating the issues of validity of California's and Nevada's selections of school lands pending a determination of relocation of the boundary.

In support of their first contention, California alleges that prior to May 1, 1873, Nevada selected 2,138 acres from Lake Tahoe north that were within the State of California under the currently

existing Von Schmidt line. California further alleges that after the acceptance of the Von Schmidt line, the General Land Office continued to ratify and approve selections by the State of Nevada within California as delineated by the Von Schmidt line in the amount of approximately 1,484.60 acres. California alleges similar research findings with respect to Nevada's selection of lands in the area of the oblique line. California further alleges that holdings of this Court and the Department of Interior indicate that selections of public lands not made within the proper state are invalid and remain in the public domain, and that in order to fully resolve these issues, the United States should be made a party defendant.

California asks this Court in its Motion for an order (1) granting permission to file a second amended complaint and (2) bifurcating the issues of validity of federal approval and grants and retaining jurisdiction to determine such matters in subsequent proceedings.

Nevada filed a response to the Motion on May 15, 1979. In general, this response alleges:

1. That the United States is not an indispensable party;
2. That this Court should validate private titles as quickly as possible, and that to its knowledge there is no parcel of land which California and Nevada have each patented to different parties, and that the United States is not an indispensable party for this purpose; and
3. That the question of the status and title of public lands not patented to private parties

should be bifurcated. The concluding paragraph of this section of the response states:

> Nevada believes that California's primary concern is that the matter of the status and title of the public lands selections by either State may go unnoticed, or not be addressed by the Supreme Court when it decrees the final boundary. And the Court may decline to do so for the reasons noted, supra, p. 2. Nevada submits that California's concern could be alleviated by the Special Master including in his report of findings and recommenations [*sic*] to the Court, a recommendation that the Court retain jurisdiction to address the matter of title, invite the United States to intervene and refer the question of title back to the Special Master.

After receiving these filings, and a letter from California dated May 14, 1979, which detailed California's opposition to certain of Nevada's arguments and allegations in its response, your Special Master sent the parties a letter which in substance stated:

> While there are points of disagreement between you, I believe you are in agreement that I should proceed when the case is finally submitted to make a recommendation as to the boundary and following the Supreme Court's determination of that issue we can then take up any questions remaining unsettled.

Your Special Master will include hereafter certain recommendations with regard to the matters raised in the motion for bifurcation.

III. ISSUES

There are basically two issues before the Court, the resolution of which will establish one continuous boundary between the two states.

1. What constitutes the lawful boundary between California and Nevada beginning where the 120th meridian of longitude west from Greenwich or where the 43rd meridian of longitude west from Washington intersects the 42nd parallel of north latitude and running south on said meridian to the 39th degree of north latitude, which terminus point falls in Lake Tahoe. This line is frequently called the meridian line or north-south line; and

2. What constitutes the lawful boundary between California and Nevada beginning at the intersection of either the 120th meridian or the 43rd meridian as determined under issue (1) with the 39th degree of north latitude and running southeast on a straight line to the point where the 35th degree of north latitude intersects with the Colorado River. This line is frequently called the oblique line.

Several lines are suggested by the parties. For the meridian line, these are:

1. The line surveyed by Houghton-Ives in 1863;
2. The line surveyed by Von Schmidt in 1872;
3. A line to be run due south from Major's Corner as established by him in 1868;
4. A line to be run on the 43rd degree of longitude west from Washington as provided in Nevada's constitution;

5. A line to be run on the 120th degree of longitude west from Greenwich, as provided in California's constitution; or
6. A line resulting from a new survey using modern technology and methods and more accurately locating whatever boundary line is established by this Court.

The lines suggested as the oblique line, each beginning at a point in Lake Tahoe and terminating in the Colorado River, as above described, are:

1. The line partially surveyed by Houghton-Ives in 1863, making provisions to extend that line southeasterly to the Colorado River;
2. The line surveyed by Von Schmidt in 1873;
3. The line surveyed by the United States Coast and Geodetic Survey between 1893-1899;
4. A line to be established beginning at the intersection in Lake Tahoe of the line extended due south from Major's Corner to the 39th parallel and then running southeasterly in a straight line to the Colorado River;
5. A line to be run southeasterly from the intersection of the 43rd degree of longitude west from Washington and 39th degree of north latitude to the Colorado River; and
6. A line resulting from a new survey using modern technology and methods and more accurately locating the oblique boundary line as established by this Court.

When the boundary is determined there will remain the issue of ownership and title to land which is raised by California's motion to file a second amended complaint and bifurcate issues filed since the January hearing.

IV. SURVEYS

A. Surveys of the California-Nevada Border[5]

California's eastern boundary became fixed by its Constitution of 1849 which described the boundary as:

> Commencing at the point of intersection of 42d degree of north latitude with the 120th degree of longitude west from Greenwich, and running south on the line of said 120th degree of west longitude until it intersects the 39th degree of north latitude; thence running in a straight line in a southeasterly direction to the river Colorado, at a point where it intersects the 35th degree of north latitude; . . .

Exhibit 5. When California was admitted to the Union on September 9, 1850, Congress approved the constitution without further reference to boundaries. On the same date that California was admitted, a territorial government was established in Utah, and the western boundary of Utah was fixed by Congress as being the eastern boundary of California. It was not until 1861 that the territory of Nevada was created out of Utah. Despite a suggestion from Congress that the boundary of Nevada should include the territory west to the summit of the Sierra Nevada mountains, provided California assented, California did not assent to

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5 Prior to discussing the actual surveys of the California-Nevada boundary, your Special Master should report that there is considerable evidence on methods of surveying, particularly from Francis S. Landrum, expert witness for Nevada. See pages 241-254 of the transcript, in which eleven methods of ascertaining longitude and three for ascertaining latitude are outlined. Because the recommendations of this report are not based upon a determination of the accuracy of any particular survey, the conclusion is reached, in order to save the time of those studying this report, not to set forth herein in detail any of these methods of surveying.

any change in her eastern boundary.[6]

The earliest boundary surveys were incomplete. One of the first was in 1855 when George Goddard surveyed the boundary with reference to the Carson Valley area only. Goddard's instructions from the Surveyor General of California, dated August 3, 1855, stated:

> At or near Carson Valley you will determine, astronomically, with some precision, the position of the *eastern boundary of the State*; and I would suggest that such portion of the *State line* as shall fall *in Carson Valley*, or so much of it as you may deem necessary be measured and defined with tolerable accuracy. * * *

Exhibit 64 at 264. Goddard found the intersection of the 120th meridian and the 39th parallel in Lake Bigler and deduced the position where the boundary would fall in Carson Valley.

In 1860, Congress passed an act authorizing a commissioner to act in conjunction with someone appointed by California to mark the eastern boundary line between California and the territories of the United States. The United States appointed Sylvester Mowry. Assisting Mowry in this survey was Lieut. Joseph C. Ives.[7] George Goddard indicated in a letter (Exhibit 78) that Lieut. Ives had adopted his (Goddard's) longitude at Lake Bigler for Ives' observatory. The point at the Colorado River had been located, and there is evi-

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6 See Exhibit 69 at 101 (entitled POLITICAL HISTORY OF NEVADA) for the three enlargements of its territory, only the last of which was along the California border. The map on page 21 shows the extent of these three enlargements amounting to approximately 48,875 square miles.

7 Joseph C. Ives was a first lieutenant in the Corps of Topographical Engineers. He was dismissed December 26, 1861 because of his inclination to the Confederacy and later became a colonel in its army. Exhibit PPPP at 13 n.31.

dence that Lieut. Ives may have done enough field work at Lake Bigler that the oblique boundary line could have been run. However, the remainder of the survey was canceled, so the oblique line was never marked in the field.

The next real attempt at a full-fledged boundary survey occurred in 1863 when Nevada and California conducted a joint survey, each appointing their own commissioners. California's Surveyor-General was J.F. Houghton, and the Territory of Nevada appointed Deputy Surveyor-General Butler Ives, who was no relation to Lieut. Joseph C. Ives. Houghton engaged the services of John Kidder, a respected engineer and surveyor, who in 1862 had worked with Butler Ives at the expense and direction of the territory of Nevada running a boundary survey for a short distance south of Lake Tahoe through an important mining district to determine whether the town of Aurora was in California or Nevada. This survey found that Aurora was in the territory of Nevada.

The California statute authorizing this joint survey provided that the points established by Lieut. Joseph C. Ives at the intersections in Lake Tahoe and the Colorado River were to be used. Exhibits 71/YY. According to a report by Houghton, Lieut. Ives' longitude and latitude at his observatory at the south end of Lake Tahoe were used in the survey, and they were aware, from maps, of Lieut. Ives' marking three different points at the Colorado River (Exhibit BBB at 36-37).

The Houghton-Ives survey extended from the Oregon border to approximately 103 miles southeast of the intersection in Lake Tahoe.[8] It was not

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8 This survey also found Aurora to be in Nevada.

continued to the Colorado River. Therefore, approximately 302 miles of the oblique boundary were left unmarked and unsurveyed, and more importantly, since the survey never reached the Colorado River, no corrections back from that terminal point were ever made to insure the accuracy of the line. California adopted the Houghton-Ives line by statute on April 4, 1864. Nevada adopted the line as her western boundary by statute on February 7, 1865. The same day Nevada authorized a survey extending the line an additional 30 miles. On March 10, 1865 Nevada amended the previous act and authorized and appropriated money for a 70-mile continuation of the Houghton-Ives oblique line. This work was performed under the direction of James S. Lawson. Lawson had been in the Houghton-Ives party and was familiar with the previous work and monuments.[9] The

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[9] Butler Ives reported setting four stone monuments, one 17 miles north of Lake Bigler and three on the fifth mile southeast of the Lake Bigler intersection. See Exhibit CCC. The same exhibit indicates that five stone monuments were ordered to be set on the north-south line. California's opening brief at 39 alleges that none of the monuments by this survey have been recovered with respect to the north-south line. Nevada's answer brief at 101 alleges that the "Houghton-Ives Line can be relocated from existing survey field notes, maps and monument locations", which would seem to indicate that some monuments could be recovered on the line. Nevada further alleges at page 41 of their answer brief that Von Schmidt reset and redated five of the cut granite monuments set on the Houghton-Ives line. The Sinclair Report, Exhibits 64 and DDDD, does indicate at 277-78 that two of Von Schmidt's monuments which they recovered plainly showed that the year 1873 had been changed from 1863, and were monuments originally used by the Houghton-Ives survey. Your Special Master at an informal conference with counsel, as he believes, was shown at least one such monument. While the Sinclair report mentions the recovery of five monuments on the Von Schmidt line, it does not indicate that all five showed evidence of being original Houghton-Ives monuments which were changed by Von Schmidt. There was testimony by a witness for Nevada, Mr. Bruce Greenhalgh, that he had observed a monument dated

Lawson survey extended the Houghton-Ives line approximately 73 miles. Neither the Houghton-Ives survey nor the Lawson continuation was ever adopted by the General Land Office.

The next chronological survey of importance was Daniel G. Major's survey of the Oregon-California boundary in 1868. As a part of this survey, Major was to determine the intersection of the 42nd parallel of north latitude with the 120th meridian of longitude west from Greenwich. This survey had been authorized by the General Land Office. Major, however, did not attempt to mark the eastern boundary of California. In a report of the Commissioner of the General Land Office dated October 27, 1870, which was submitted to Congress, it was noted that the 120th meridian as marked by Major[10] and as marked in the Houghton-Ives survey did not coincide.

> The plat thus constructed (of which a copy is herewith transmitted) developes [*sic*] a considerable discrepancy in longitude between the monuments fixed by the two different surveyors for the northeastern corner of the State [California]. . . .
>
> Should the supposed discrepancy be fully tested and proved to exist, it will awaken the inquiry whether the matter is not of sufficient importance

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1873 which in his opinion had been changed from 1863. There are photographs of this monument in evidence as Exhibits RRR, RRR-1, RRR-2 and RRR-3. This monument would have been in a different location than the two expressly mentioned in the Sinclair Report as being changed by Von Schmidt. Your Special Master, for the reasons following in the report, has concluded that it is not necessary for him to resolve the conflict of how many monuments remain standing as originally placed on the Houghton-Ives line, and how many monuments were actually appropriated by Von Schmidt, as it does not in any way affect the outcome of this litigation.

10 Several photographs of Major's monument have been introduced into evidence by Nevada. See Exhibits A, B, and C, RRRR and SSSS.

> to demand a determination by competent officers of the Government, and, with the aid of the telegraph, of the point of intersection of the 120th degree of longitude with the line of the Central Pacific Railroad, and such a correction of the eastern boundary of this State [California] as that determination might show to be necessary.

Exhibit 98 at 465.

The location of the 120th meridian at the crossing of the Central Pacific Railroad was determined with the aid of the telegraph by George Davidson during the summer of 1872. Davidson was an assistant with the United States Coast Survey. The location of Davidson's station was at Verdi, Nevada. He spent about a month there making observations.[11] Davidson also did not attempt to mark the eastern boundary line of California.

The Commissioner of the General Land Office had reported in 1871 that the difference between the 120th meridian as marked by Major and as marked by Houghton-Ives was about two miles and thirty chains,[12] with Major's survey being the farthest west. The Commissioner recommended that money be appropriated for a survey of the entire eastern boundary of California. This was done by Congressional act of June 10, 1872. Al-

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11 After completing the work at Verdi, Davidson went to Summit, a station at an elevation of 7200 feet, on the line of the Central Pacific Railroad in the pass of the Sierra Nevada and at the head of Donner Lake. This was a much higher elevation than any at which Davidson had worked at previously. The purpose of going to Summit was to determine whether higher elevations were better than lower ones for astronomical observations. It is not clear from the record whether Davidson did any checking on the accuracy of his determination of the 120th meridian results as determined at the Verdi station. His results at Summit indicated that higher elevations were more favorable for observations.

12 A chain is 66 feet; a mile contains 80 chains. See Exhibit PPPP at 29, n.74.

lexey W. Von Schmidt received the contract to act as United States surveyor and astronomer.

Von Schmidt's special instructions, dated July 31, 1872, specifically stated:

> You are intstructed [*sic*] to proceed to the field and commence operations at the initial point, at the monument already established at the intersection of the one hundred Twentieth meridian West from Greenwich with the Forty Second parallel, by Daniel G. Major, Astronomer and Surveyor, Extract of description of which herewith marked "A".

Exhibits 133/VVV at 1-2. The special instructions further provided that:

> You will determine the point of the intersection of the Thirty-ninth parallel of north latitude with the one hundred Twentieth meridian west from Greenwich, this will be done in the most thorough and accurate manner, and I have to advise you that no observations for latitude or longitude will be considered satisfactory whose probable error is greater than three seconds of arc (3″).

Exhibits 133/VVV at 4.

Von Schmidt was aware of George Davidson's work with the telegraph and his establishment of the 120th meridian at Verdi.[13] Von Schmidt tele-

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13 Nevada's answer brief indicates at 37 that:

> In August of 1872, about the time Von Schmidt had taken to the field to begin his survey, Davidson was exchanging telegraphic signals with Throckmorton at Verdi for personal equations. Von Schmidt was present at the exchange of these telegraphic signals at Verdi and obtained from Davidson his observations of the location of the 120th meridian at the crossing of the Central Pacific Railroad.

No citation or other reference is given for the above statement. Your Special Master is not aware of any reference to the fact that Von Schmidt was present at the exchange of signals in the materials admitted into evidence. However, Von Schmidt telegraphed Drummond on August 13 of Davidson's work, which was done primarily in July. Davidson himself reported its completion on August 6. See Exhibits 116, 100. Thus, even if Von Schmidt was not present at the exchange of

graphed the Commissioner of the General Land Office on August 13, 1872 stating:

> Davidson of Coast Survey just established at Verdie [*sic*] on Railroad one hundred & twenty degrees longitude finds all former work wrong. I propose to start at his point run north to Oregon line on Randoll Marke coming down. Can I do it? like to have orders from Coast Survey to Davidson to give me his point.

Exhibit 131. This was followed the next day by a more explicit letter indicating that Davidson found all monuments previously set were 4000 feet too far west. Exhibit 132. The Commissioner responded by letter dated August 29, 1872, stating that Von Schmidt was not to rely on Davidson's work, but to make his own observations and that Major's Corner must be considered the starting point of Von Schmidt's survey (Exhibits 108/WWW-5). By this time, Von Schmidt had already concluded that the only reliable method of establishing the boundary line was by telegraphic communication. He had made his own observations at Verdi, exchanging time signals with Professor George Davidson who operated the astronomical station at San Francisco.[14]

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signals, he was in close contact with the personnel at the San Francisco station.

14 See Exhibits 105/XXX and ZZZ, which is Von Schmidt's report to Drummond. In this report, Von Schmidt states that he stayed one week at Verdi taking observations which he found agreed with those taken by Davidson. The briefs of California and Nevada do not discuss the fact that Von Schmidt allegedly took his own observations. However, Von Schmidt did adopt Davidson's work, stating in his report:

> Being convinced that the work of Professor Davidson in establishing this Longitude was correct, and having great confidence therein, I concluded to adopt his 120th Degree of Longtitude, more especially as the season was rapidly drawing to a close (it being then September) and the time for completing my work necessitating expedi-

Von Schmidt was running a flag line north from Crystal Peak toward the Oregon border when he received Commissioner Drummond's response. He dutifully stopped running his line, proceeded to Major's Corner, and after making some observations of Polaris, proceeded to run a boundary line south from Major's Corner, establishing monuments[15] at every mile in accord with his specific instructions. However, after he had covered 100 miles, he found that the line he had started running north from Crystal Peak did not connect with the one he was running south from Major's Corner. His report states: "[T]he line run from Major's Corner was three miles, twenty four chains and fifty one links west of the flag line run north from Crystal Peak . . . ." Exhibits 105/ZZZ at 5-6. Von Schmidt concluded that his flag line north from Crystal Peak was the correct 120th meridian because it was based on telegraphic signals which were not readily assessible to or used by Major. Von Schmidt reported that he:

> . . . concluded to return at once to the Oregon line, move the initial point of my survey, on the 120° of west Longitude as found by myself and re-run the line again from the north. As I have hereinbefore stated, the difference between the two lines, at a

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tion, as no work can be done in the mountains during the winter months.

I would here state that subsequent reductions of these observations of Prof. Davidson, have proved the accuracy thereof. (see copy of Letter and Telegram from J. E. Hilgard enclosed) herewith.

Id. at 16-17.

15 Photographs are in evidence showing three of Von Schmidt's monuments. They are: the monument at the intersection of the 120th meridian with the 42nd parallel of north latitude, Exhibits D, E, and F, a monument south of Carson City, presumably set at 221 miles and 76 chains from Oregon, Exhibits RRR, RRR-1, RRR-2 and RRR-3, and the iron monument north of Lake Tahoe, Exhibits CCCC and CCCC-1.

> point 100 miles south of the Oregon Boundary was 3 miles 24 chains and 51 links; making allowance for convergency of meridians, this would make the lines differ at the 42nd parallel 3 miles 18 chains and 73 links, I therefore ran a line due East from Major's Corner 3 miles 18 chains and 73 links, and there established a large stone monument . . . .
>
> . . . .
>
> No pains were spared to run this line correctly.

Exhibits 105/ZZZ at 6-8.

This was not the last of Von Schmidt's problems in running the boundary survey. Because of the time lost in running the flag line at two different locations, and retracing his steps, he was forced to abandon the survey for the winter before he had done any work at all on the oblique line. There was a heavy financial burden in running the line twice also. Von Schmidt requested payment immediately upon completing the north-south portion of the line stating: ". . . I assure you that I have expended about the whole amount of the contract price of this portion, leaving nothing for my services." Exhibit 107 at 5. Once he began work on the oblique line and reached the Colorado River, Von Schmidt found the river had shifted since Lieut. Ives had mapped the area and established points there in 1861. He was informed that the river had shifted twice in the past 12 years. He wrote Commissioner Drummond to inquire whether:

> . . . I shall recognize the intersection of the 35° of Latitude with the old channel of the River as it was established by Lt. Ives or the intersection of the 35° of Latitude with the present channel as I now find it.

Exhibit 144. Drummond's response was that Lieut. Ives' survey had never been recognized and

he was to use the present river channel. Exhibit 145. This posed somewhat of a problem, because Von Schmidt had run his random line from Lake Tahoe expecting to hit Lieut. Ives' point at the Colorado River. The letter from Drummond would have necessitated Von Schmidt's correcting his entire oblique line if the line were to be accurate. Von Schmidt's report on the oblique line indicates that he made corrections. "The Field Notes represent the true line which was corrected from the random line, consequently no astronomical work was done thereon." Exhibits 146/AAAA at 6.

The General Land Office approved Von Schmidt's survey of the 120th meridian on May 1, 1873, but with sharp criticism. See Exhibits 130/WWW-9. The record does not reflect any definitive approval of the oblique line from the General Land Office, although both states were required to cause public lines to be closed on the new line. *See, e.g.*, Exhibits 109, 111. When the survey was finished it was not adopted by statute by either of the states, although it was recognized by both because of instructions from the General Land Office. It was not until July 10, 1978, after the institution of this suit, that California by statute adopted that portion of the Von Schmidt survey from the 42nd to the 39th parallel.

During the early to mid 1880's the accuracy of the oblique boundary line as established by the Von Schmidt survey was questioned. By 1882 the United States Engineer Office had prepared a map using their own calculations and one of the men in charge had determined that there was a serious error in Von Schmidt's oblique boundary line. See Exhibit 152. As detailed more fully in Nevada's brief at 46-50, the United States Senate passed a

resolution directing an investigation of the oblique line. California went so far as to appropriate money for a survey of the oblique line which was performed by Grunsky and Minto in 1889-90. They located the terminal points of the oblique line at Lake Tahoe and the Colorado River. Owing to limited funding the Grunsky-Minto survey only ran approximately 17 miles south from Lake Tahoe, so their survey was of little real value in terms of defining the boundary. However, it did indicate that Von Schmidt's oblique boundary line was in error.

Congress appropriated the money for a new oblique line survey in 1892. See Exhibits 162/T. This was undertaken by the United States Coast and Geodetic Survey during the years 1893-99. The United States Coast and Geodetic Survey personnel who supervised this survey were George Davidson, C.H. Sinclair, and W.B. Fairfield. The report made of this survey by C.H. Sinclair indicates that Von Schmidt's monument at the north shore of Lake Tahoe was 1727 feet too far west. As an end result of the Coast and Geodetic Survey, Nevada gained about 321 square miles and California gained about 65 square miles, making a net gain for Nevada of approximately 256 square miles. Exhibits 64/DDDD at 314. It was also discovered that Von Schmidt did not correct the entire length of the oblique line back from the then current channel of the Colorado River. In a letter from C.H. Sinclair to the Superintendent of the Coast Survey, Sinclair states:

> We found that Von Schmidt—whose random had to be corrected 118 chains—put all of this in less than 100 miles.—that is, he did not go over all of his line and correct it but cut in sharply so as end his work less than 100 miles from the Colorado River. The

> consequence was that we crossed the Von Schmidt line twice, once at 55 miles from Lake Tahoe and again about 60 miles from the Colorado River. Had Von Schmidt corrected his line all the way to Lake Tahoe we would not have crossed it at all.

Exhibit 171 at 2.[16] The U.S. Coast and Geodetic Survey of the oblique line was adopted by statute in 1901 in California, (see Exhibit 177) and in 1903 by Nevada (see Exhibits 178/Z). Nevada's statute adopting the 1893-99 survey remained in effect until it was repealed on April 24, 1979. This was well after the initiation of this lawsuit.

B. Accuracy of the Surveys

In order to place the surveys in perspective, a few observations are needed. The only survey to run the entire length of the boundary was made by Von Schmidt in 1872. The only other survey of the entire line between the 42nd and 39th parallels of north latitude was by Houghton-Ives in 1863. The distance between these two lines is approximately one mile. See Exhibit 2. The distance between the corner set by Major, and that set by Von Schmidt, was approximately 3 miles, 18 chains and 73 links. With regard to the oblique line, the only complete survey ever made other than Von Schmidt's was the U.S. Coast and Geodetic Survey in 1893-99.

It is doubtful if any of these surveys are entirely accurate. There is evidence in the form of an 1884 letter (Exhibit 153), testimony by California's ex-

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16 See also Sinclair's Report, Exhibits 64 and DDDD, at 281-82, which contains similar statements, and Exhibits LLLL, LLLL-1 and MMMM which are maps showing the various oblique boundary lines. Sinclair's official report stated that Von Schmidt's correction was made in 130 miles, instead of less than 100 miles as his earlier letter states.

pert witness, Francois Uzes at Tr. 44, and a map depicting the various surveys and boundary lines in contention, Exhibit 4, which shows that Von Schmidt's meridian line and oblique line would not intersect at the 39th parallel of north latitude, but instead at a point west of the designated boundary intersection. Mr. Uzes also testified that Houghton-Ives oblique line would not be in alignment with the meridian line so as to make the correct intersection. It can further be seen from examining Exhibit 4 and the large aerial photo map taken from a U-2 plane which is Nevada's Exhibit 0000 that the Von Schmidt meridian line and the U.S. Coast and Geodetic Survey line will not intersect each other on the 39th parallel.

Von Schmidt's survey of the north-south line has an error in that the line is not straight but deflects somewhat to the west. His oblique line obviously was not straight because he did not correct back from the Colorado terminus the entire length of the line. The fact that the U.S. Coast and Geodetic Survey oblique line crosses Von Schmidt's line at two points is rather conclusive evidence on this point. It is your Special Master's opinion that these errors were not due to lack of skill on Von Schmidt's part, but more likely financial difficulties and hardship experienced in part because he had to duplicate considerable time and effort on both the oblique and north-south lines. In discussing Von Schmidt's oblique line, Francis S. Landrum, Nevada's expert witness at the hearing, made a worthwhile observation with regard to the fact Von Schmidt reported he had missed Lieut. J.C. Ives' point at the Colorado River by 20 chains, which is a quarter of a mile.

> I would say if a person ran an oblique geodetic line across the face of the earth, which is possibly the longest one in the world, is possibly the most difficult line that a surveyor could be called upon to run under any circumstances, over mountains, over deserts, in a period of about three and a half months, and missing a monument of Lieutenant Ives in the Colorado River by only 20 chains, when you compare against the Coast and Geodetic Survey which some twenty years later accomplished roughly the same feat with a far larger crew, and approximately six years, seven years existing from start to finish, with improved techniques, with telegraph available at both ends of the line, and missing 150 meters in their random line, which reduces to about 475 feet more or less, which reduces into chains in the vicinity of about 7-1/2 chains, or roughly their error was a third of what Von Schmidt's was, I would say that Von Schmidt's line would be an absolute acme of accuracy, his random line.

Tr. at 300.

Every surveyor probably did as well as could be expected with what he had to work with and the conditions at the time. The notes of these men are a reminder of the hardships endured. Davidson, who established the location of the 120th meridian and whose work was ultimately adopted by Von Schmidt, reported that while he was working at Verdi the temperature reached 127 degrees Fahrenheit during part of the time, and that the weather was extremely dry and hot. In Von Schmidt's report to Commissioner Drummond of his survey of the oblique line, he stated:

> The only method that I might have used for checks on my astronomical work, would have been observations of the moon culminating stars, but to do this with any degree of certainty would require at least 30 days observations at each station, and time being precious, I concluded to rely upon the

> observations taken:—When I call your attention to the fact that the southerly line runs through the worst Deserts, and over the most broken Ranges of mountains that exist west of the Rocky Mountains; that the heat, on the last 200 miles averaged in the shade from 8 A.M. to 5 P.M. 116°—and in the sun from 145° to 165°—also 90° to 100°, and even over, during the night—Water had to be packed on mules from 10 to 30 miles, Provisions for 15 men and Twenty animals also to be packed. (The heavy horse Team could be got no farther south than Grape Vine Springs) and the men and animals suffering from heat and bad water, (it is all more or less alkalied) will be the only excuse I can offer if there should seem to you to exist any laxity of astronomical work.

Exhibits 146/AAAA at 4-5.[17]

Given the nature of some of the country, it is also not unlikely that the surveyors felt that any deviation in their line would make little difference. For example, in Von Schmidt's report on the north-south line, he states:

> In conclusion I would state that the line, with but very few exceptions, runs over a most miserable and worthless tract of country, and any change made from the line run in 1863, will make but a very little difference to either the state of California or Nevada so far as Taxable property is concerned.

Exhibits 105/ZZZ at 14.

The 1893-99 Coast Survey was undoubtedly more accurate than Von Schmidt's not only because of the time taken to measure it, but the method. State boundaries are referenced to astronomic po-

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17 Drummond had earlier criticized Von Schmidt's report on the north-south line stating: "[A] total absence of astronomical observations characterizes your work." Exhibits 129 and WWW-7. Thus, Von Schmidt may have been concerned with receiving similar criticism with regard to his report on the oblique line.

sitions. See Exhibit 12 at 2. There is a difference between astronomic observations and geodetic computations. Exhibit 27 at 5-6 states:

> The question has often been asked whether a boundary defined by statute or treaty, as on a specified parallel of latitude or meridian of longitude, should be located by direct astronomic observations or from geodetic computations giving a mean position derived from a great number of observations. It has generally been agreed that an astronomic location is the proper one, but astronomic and geodetic positions may differ materially. For example the astronomic stations on the 49th parallel boundary east of the Rocky Mountains vary from 6 seconds north to 8 seconds south of the mean parallel of latitude—or a range of more than a quarter of a mile. It seems likely that for future surveys geodetic positions will be used wherever available.

The Coast survey not only determined the endpoints of the oblique line astronomically, but geodetically. As stated in Exhibit 240, the affidavit of Mr. Uzes, California's expert witness:

> The advantage of this operation is that geodetic calculations on the "mathematical earth" will provide a more accurate starting direction for the initial random line. Geodetic triangulation was also extended along the entire length of the boundary for determining positions of points on the line. (See Nev. Exhibit LLLL-1). The Coast and Geodetic oblique was first run as a straight line to the calculated geodetic position at the Colorado River. Upon reaching the river, the error of closure upon the intended terminus (centerline of river at 35° north latitude) was determined. The error was then proportionately distributed all the way back to Lake Tahoe, with new points marked on the ground. This resulted in a final "corrected line" located by offsets from the initial random line, all of which were located upon the geodetic datum.

Exhibit 240 at 7-8.

Recently the National Geodetic Survey conducted observations at three California-Nevada boundary monuments near Lake Tahoe to verify the reported position of the 120th meridian as established by the Sinclair Report (in evidence as Exhibits 64/DDDD) which detailed the 1893-99 survey. The results of the 1978 survey differed to some extent, and the 1978 report concluded:

> Differences between the 1893 and the 1978 observations could be caused by procedural changes. These would include the following: (1) astronomic positions observed in 1893 were not reduced to a mean pole, (2) the star catalogs used were in a slightly different coordinate system, and (3) observation methods, reduction procedures, and instrumentation techniques were different. A detailed analysis of these differences is not part of this study. We feel that agreement, commensurate with the known differences in techniques, has been obtained between the 1893 and the 1978 astronomic positions.

Exhibit 239 at 4.

V. THE EXISTING CALIFORNIA-NEVADA BOUNDARY LINE

The boundary line currently marked on the ground and used by both states as the 120th meridian between the 42nd and 39th parallels of latitude is the line run by Allexey Von Schmidt in 1872. This is the line that California, as the plaintiff, contends should be determined to be the lawful boundary between the states by virtue of prescription and acquiescence.

As mentioned earlier under Section IV entitled Surveys, subpart B entitled "Surveys of the California-Nevada Border", the Houghton-Ives line was adopted by statute in both states. The Von Schmidt line was never adopted by either state prior to this lawsuit. Thus, the Houghton-Ives line remained the only boundary adopted by statute by both states up until the time of this lawsuit although it was not used after the time of the Von Schmidt survey.[18]

Various Nevada state agencies have recognized, and use, the north-south portion of the Von Schmidt boundary line in their daily operation.

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18 The exact date of the transition over to the north-south Von Schmidt boundary line is not known. It was, in all likelihood, a gradual process of transition. See Exhibit 134, which is a letter from the General Land Office to the U. S. Surveyor General in Nevada, dated April 21, 1873, indicating that a new boundary line between the 42nd and 39th parallels of north latitude has been established which is farther east than the 1863 survey. The letter indicates a copy of the map and field notes "will be forwarded to you at an early day" and that the oblique line is yet to be run. In the meantime, the Surveyor General is directed to "refrain from letting contracts in the immediate vicinity of the boundary line until further advised." For the purposes of this lawsuit, the date of transition makes little difference since Nevada has admitted in the pleadings that both states have exercised jurisdiction up to the Von Schmidt line, as currently marked on the ground, since 1873.

Examples of such agencies, without being inclusive, are:

1. The Nevada State Patrol since its creation in 1949 (Defendant's Answer to Plaintiff's First Set of Interrogatories, hereinafter referred to as Filing 1A, No. 9);
2. Nevada Department of Highways since its creation in 1917 (Filing 1A, No. 12);
3. The Revenue Division of the Nevada Department of Taxation since the date the "Von Schmidt" line was surveyed (Filing 1A, No. 15);
4. The Nevada Department of Education since its creation in 1956 (Filing 1A, No. 21);
5. The Nevada Department of Forestry since its creation in 1952 (Filing 1A, No. 23); and
6. The Nevada Gaming Commission and State Gaming Control Board since the Board's creation in 1955 (Filing 1A, No. 27).

The boundary line currently marked on the ground and used by both states as the oblique boundary is the line run by the United States Coast and Geodetic Survey from 1893-99. This is the line that California, as the plaintiff, contends should be determined to be the lawful boundary between the states by virtue of prescription and acquiescence. This line was adopted by statute both by California (in 1901) and Nevada (in 1903). These statutes remained in effect until after the institution of this lawsuit when Nevada repealed her statute.

The various Nevada state agencies have recognized and use the current boundary in their daily

operation. Examples of such agencies, without being inclusive, are:

1. The Nevada Department of Taxation, Revenue Division, the Nevada Highway Patrol Division, the Nevada Department of Highways, the Nevada Department of Education, the Nevada Department of Forestry, the University of Nevada and the Nevada Gaming Commission and State Gaming Control Board since each agency's inception or the line's establishment, if such agency preceded the line (see Defendant's Response to Plaintiff's Second Request for Admissions, hereafter referred to as Filing 12, No. 63); and
2. The Nevada Department of Motor Vehicles, Nevada National Guard, Nevada Department of Resources and the Nevada-Tahoe Regional Planning Agency all rely upon the currently posted and marked boundary (Filing 12, No. 67).

Thus, the currently posted Von Schmidt north-south line has been in use by both states for over 100 years, and the oblique line marked by the U.S. Coast and Geodetic Survey has been used by each state for nearly 80 years.

VI. A NEW SURVEY

At issue in this case is whether the Court should order a resurvey and thus a relocation of both the 120th meridian west from Greenwich and of the oblique line.

It is the final alternative proposed by California in its amended complaint. It was also the proposal of Assemblyman Mike Cullen, who is now satisfied with California's presentation of the issue. It is also one of Nevada's proposals, to be exercised only if the Court cannot approve one of the well-known surveys.

It is clear from the record, and may be a fact of which judicial notice could be taken, that modern surveying methods have been greatly improved since the admission of California and Nevada to the Union, and since any of the surveys done in the 1800's. No one questions the capability of the early surveyors; they were without a doubt some of the most skilled in their profession. However, there is little doubt that the boundary line of the 120th meridian and the oblique line could be determined more accurately today.

The new methods involve laser beams and radio signals. Laser beams can be of help where mountainous terrain or forests present a problem for surveyors. The laser shoots a "pole" of light at least a mile high. The beam reflects off of dust particles and air molecules, and the reflection is spotted by a receiving instrument. This laser instrument can take a reading between two points with a mountain or forest range in between and reportedly be off line an average of only three inches.

The second method is called ARIES, and the letters stand for Astronomical Radio Interferometric Earth Surveying. It was developed by the California Institute of Technology's Jet Propulsion Laboratory in conjunction with the National Aeronautics and Space Administration (NASA). As explained in California's Opening Brief at 69-70:

> Very simply, this system which is a Very-Long-Baseline Interferometry (VLBI) technique operates by measuring from two or more stations relative arrival times of radio signals transmitted by quasars and radio galaxies billions of light years away. Because ARIES is a radio astronomic technique and does not depend upon gravity as an earth reference, it is capable of making extremely accurate geographic determinations free of the major sources of error caused by the gravitational force, the wobble of the earth's axis, and the inaccuracy of time signals typically associated with traditional optical methods. (C.C. Counselman, III, *Very-Long-Baseline Interferometry Techniques Applied to Problems of Geodesy, Geophysics, Planetary Science, Astronomy, and General Relativity*, Proceedings of the IEEE (September 1973) vol. 61, No. 9, p. 1225; Peter F. MacDoran, *Radio Interferometry for International Study of the Earthquake Mechanism*, Acta Astronautica (Pergamon Press 1974) vol. 1, pp. 1427-1444).

The question is not whether this boundary can today be measured more accurately than in the distant past, but whether if this Court ordered such a resurvey, it would be an open invitation to needless nationwide boundary litigation. Even more highly sophisticated methods may be developed in the future with greater accuracy than those now known. If absolute accuracy or even minute accuracy is the goal, we are in a never ending search. This Court has recognized and enforced on several occasions state boundaries

which had been adopted and used by the parties for several years even though they were not totally accurate. In *Virginia v. Tennessee*, 148 U.S. 503, 522 (1893), it was stated:

> Independently of any effect due to the compact as such, a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. . . .

For further citations of authority on this point, see Nevada's brief at 105-06 which is part of its Argument III entitled "Accuracy in a Survey is not Essential to its Legal Adoption as a State Boundary."

I see no occasion for a modern survey under the facts here developed and recommend against such a course in this case.

PRESCRIPTION AND ACQUIESCENCE

The doctrine of prescription and acquiescence has long been recognized in this Court. The law of prescription was mentioned by name in the case of *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 748 (1838).[19]

> When that is done, the court must decide according to the law of equity (1 Ves. sen. 446, 203), whether the agreement pleaded shall settle, or leave the boundary open to a settlement by our judgment, according to the law of nations, the charters from the crown under which both parties claim (as in 5 Wheat. 375); by the law of prescription, as claimed by the defendant, on the same principles which have been rules for the action of this court in the case. 1 Ves. sen. 453; 9 Pet. 760.

More recently in 1890 the word "acquiescence" was used and the doctrine of prescription and acquiescence applied in deciding the case of *Indiana v. Kentucky*, 136 U.S. 479 (1890):

> It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to as-

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19 Further early history on boundary disputes prior to the Constitution and particularly under the court provided by the Articles of Confederation for the handling of such disputes is found in the appendix to 131 U.S. beginning at page (L). From *Rhode Island v. Massachusetts*, *supra* at 723, we learn:

> It is a part of the public history of the United States, of which we cannot be judicially ignorant, that at the adoption of constitution, there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies.

sert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.

Id. at 509-10.

In *New Mexico v. Colorado*, 267 U.S. 30 (1925), the Court accepted and relied upon a stipulation making reference to acquiescence, quoting therefrom:

> [T]he said Darling line has been recognized and acquiesced in by the United States, by the Territory and State of Colorado, by the Territory of New Mexico and by the State of New Mexico except as otherwise indicated by the bringing of this suit, and has been and is now recognized and accepted by the Land Department of the United States, in its surveys of the public domain, as the boundary line between Colorado and New Mexico from the Macomb Monument westward, except so far as may otherwise appear (if it does otherwise appear) by the record in this case; that from 1868 to the present time the Territory and later the State of Colorado . . . has claimed and exercised dominion and sovereignty, and now claims the same, over the territory down to the boundary as established by said Darling and no farther; that county lines have been formed, towns and settlements have grown up, school districts, election districts, voting precincts, and land districts and water districts have been created with reference to said line; public officers have been elected, property has been assessed and taxes levied and collected under the authority of the Territory and State of Colorado, and its courts of both civil and criminal jurisdiction have exercised jurisdiction in all places north of said Darling line and the Territory and State of New Mexico has exercised like jurisdiction in all places south of said line; that government postoffice[s] have been established as being in Colorado when north of said line and as in New Mexico when south of said line, and that public land surveys on both sides of said line have been closed thereon, lands have been disposed of, rights acquired and political boundaries in both Colorado and New Mexico have been fixed by reference to said line.

Id. at 38-39.

Notwithstanding the use of another line between 1904-08, the United States and both states were held to have exclusively recognized the Darling line from 1868 to 1904 and after 1908.

More recently the doctrine of prescription and acquiescence was discussed in an opinion written by Mr. Justice Blackmun in the case of *Ohio v. Kentucky*, 410 U.S. 641 (1973), where he stated:

> **We need intimate no view on the merits of Ohio's historical analysis, for the State's long acquiescence in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the northern half of the river, convince us that it may not raise the middle-of-the-river issue at this very late date. . . .**
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> *** * ***
>
> **Ohio does not say that its failure to assert its claim over the past century and a half is due to any excusable neglect. The implications of *Handly* and later decisions of this Court are too clear to support that claim. Ohio recognized this in its initial brief here. Nor, in the light of the longstanding and unequivocal claims of Kentucky over the river, and Ohio's failure to oppose those claims, may Ohio credibly suggest that it has not acquiesced. "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926). To like effect are *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Maryland v. West Virginia*, 217 U.S. 1, 42-44 (1910); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 523 (1893); *Indiana v. Kentucky*, 136 U.S., at 509-510, 518; *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846).**

***Id.* at 649, 50-51 (footnotes omitted).**

In 1940 Mr. Chief Justice Hughes in *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940), concluded the principle of acquiescence and prescription is "essential to the 'stability of order' as between the States of the Union." This statement cannot be repeated too often in these boundary dispute cases, even though another shooting war between these two states, such as occurred in 1863,[20] would not be predicted by your Special Master.

As can be seen from the facts presented earlier, Nevada has admitted that both states have exercised since 1873 and continue to exercise jurisdiction and sovereignty up to the Von Schmidt north-south line, and that it has not requested a resurvey of this line. By statute California adopted the U.S. Coast and Geodetic Survey's oblique line in 1901 and Nevada adopted it in 1903. The line has been in use ever since with both states exercising jurisdiction and sovereignty up to it. Thus the doctrine of prescription and acquiescence becomes applicable here.

Nevada argues that once the states established the boundary line by the Houghton-Ives joint survey, it could not be moved by any act of Congress authorizing a new survey, and that any new survey was unconstitutional and void. Nevada argues that any inaction on her part cannot condone the original unconstitutional act. In the alternative, Nevada argues that if the states themselves cannot establish the boundary by agreement, then the first survey authorized by the United States, that being the points marked by Lieut. J.C. Ives in 1861

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20 An allegation in Paragraph IV of the Amended Complaint of "border disputes that led to armed conflict" is admitted in Paragraph IV of the Answer. See also Exhibits 39, 53, 54, 55 and 58 for interesting details.

and Daniel Major in 1868, should constitute the boundary. This is a rather novel argument, and Nevada itself admits at page 89a of its answer brief that with regard to a state's inability to acquiesce in an unconstitutional act "Federal decisions directly applying this principle have not been found."

To establish either the Houghton-Ives line, which was never a complete survey and was used only for a period of approximately ten years, or to establish a boundary line extending from Major's Corner, which line has never even been run, would defy all principles of law and logic where individual property owners have relied upon the current line which has been in existence for so many decades. This Court has been quick to recognize that one of the reasons for applying the doctrine of prescription and acquiescence is to prevent the displacement of persons from their homes.

> There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.

Virginia v. Tennessee, 148 U.S. 503, 524 (1893).

Furthermore, the act of the General Land Office in authorizing a survey of the 120th meridian by Von Schmidt was not for the purpose of moving or changing the boundary between the states. Indeed, the General Land Office did not officially recognize the Houghton-Ives survey. The General Land Office was attempting instead to establish the given boundary line and resolve what appeared to be an inherent conflict between the me-

ridian as found by Major and as found by Houghton-Ives. Thus, as previously stated, the new survey did not take effect "as an alienation of territory, but as a definition of the true and ancient boundary." *Virginia v. Tennessee, supra* at 522. The same is true with regard to the survey made by the United States Coast and Geodetic Survey—it did not amount to an alienation of territory, but an attempt to resolve disputes as to the true boundary.

It should again be noted (1) that California as its second affirmative defense urges in its reply in effect that the Von Schmidt line be determined as the boundary between the 39th and 42nd parallels and that the oblique line as marked by the U.S. Coast and Geodetic Survey be determined to be the boundary from the 39th parallel to the 35th parallel; (2) that Nevada, urges in paragraph 4 of its counterclaim:

> If the prayers set forth in 1-3 above not be granted, then that the line presently recognized on the ground as the boundary between the States of Nevada and California be adjudged the legal boundary between California and Nevada by acquiescence.

Both parties in these alternative positions are, in effect, recognizing the law of prescription and acquiescence.

Your Special Master believes that the doctrine of prescription and acquiescence should be applied in this case.[21]

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21 In *Rhode Island v. Massachusetts, supra*, at 734 this Court said:

> No court acts differently in deciding on boundary between states, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking

grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied, without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be. When no other matter affects a boundary, a decree settles it as having been by original right, at the place decreed; in the same manner, as has been stated, where it is settled by treaty or compact; all dependent rights are settled, when boundary is. 1 Ves. sen. 448-50. If, heretofore, there was an issue in this case, on the locality of the point three miles south of the southernmost point of Charles river, we should be competent to decide it; and decree where the boundary between the states was, in 1629 and 1663, at the dates of their respective charter.

RECOMMENDATIONS

For the reasons given above your Special Master recommends:

1. That the boundary between the States of California and Nevada be determined and established to be the line known as the Von Schmidt line from its beginning at the intersection of the 42nd parallel of north latitude on the Oregon border and the 120th degree of longitude west from Greenwich, each as established by Allexey W. Von Schmidt in 1872 and extending south as marked and determined by Von Schmidt to the point in Lake Tahoe where such north and south line intersects the 39th parallel of north latitude, and continuing from such point on a straight line known as the United States Coast and Geodetic survey line as established by it from 1893-1899 running in a southeasterly direction to the point where the 35th parallel of north latitude intersects the Colorado River as determined by compacts between Arizona-Nevada and California-Arizona.

2. That the two states be given the right and opportunity to determine by agreement the point in Lake Tahoe where the north and south line ends and the oblique line begins and how it shall be marked, if at all, subject to approval of this Court, and in the absence of agreement that the Special Master, after hearings and testimony, make his recommendation as to the determination of said point and whether it shall begin exactly on the 120th meridian or exactly on the 39th parallel, or at a point approximately at such intersec-

tion, in order to do justice between the parties.

3. In event the parties are unable to agree upon the marking on the ground of either the Von Schmidt line or the U.S. Coast and Geodetic Survey line, that the Special Master be authorized to arrange for a survey as needed of any portions of either line, at the cost of the parties, each party on order of the Special Master contributing one-half of the estimated cost thereof, and report his recommendations to this Court.

4. That California's Motion to File a Second Amended Complaint and Bifurcate Issues with respect to ownership of disputed lands on the California-Nevada boundary be allowed.

5. That the Special Master be authorized to determine after conference with the parties and with a representative of the Office of the Solicitor General of the United States, whether the United States should be made a party to this case, and to hold hearings if such are deemed necessary as to the interest, if any, of the United States in any lands patented or granted to either the State of California or the State of Nevada along the boundaries herein determined, and to make such recommendations as are just and equitable under the prayer of each state for such other and further relief as the Court may deem proper, including recommendation as to the quieting of title to any lands, if needed.

6. In any further hearings relating to land ownership, or title thereto or to the quieting of title or in event of dispute between the two states or between either state, or both states, and the United States, as to location and ownership of land, that the California Land Title Association be permitted, to the extent the Special Master deems necessary, to file briefs *amicus curiae*.

7. That the Court reserve the final taxing of costs herein until its further order and after a further report as to such survey and the cost thereof from the Special Master.

Respectfully submitted,

ROBERT VAN PELT
Special Master

IX. APPENDICES

A. Summary of California Exhibits, and Other Evidence

1. Map, California Boundaries as Set Forth in the Constitution of 1849 (8 1/2" × 11").
2. Map, Lines at Issue in Vicinity of 42° North Latitude (8 1/2" × 11").

2A. Francois D. "Bud" Uzes qualifications as expert witness on surveying and boundary issues.

3. Map, Oblique Lines in Issue at Lake Tahoe (8 1/2" × 11").
4. Map, Alternative Constructions of Interstate Border in Lake Tahoe (30" × 44 1/2" approx., plus three color reductions 6 3/4" × 10").
5. CAL. CONST. of 1849, art. XII (1853 Cal. Comp. Laws at 58). Description of state boundary.
6. Act of Sept. 9, 1850, ch. 50, 9 Stat. 452. An Act for the Admission of the State of California into the Union.
7. CAL. CONST. of 1879, art. XXI § 1 (1880 Cal. Stats. at xlii). Description of state boundary.
8. CAL. CONST. of 1879, art. XXI, § 1 (as amended 1956). Description of state boundary.
9. CAL. CONST. of 1879, art. III, § 1 (as amended 1972). State boundary description.
10. Stipulation between California & Nevada, Dec. 16, 1978. Copies of 1956 and 1972 amendments to California constitution attached to Stipulation are true and accurate copies of the amendments.
11. Cal. Const. Revision Commission memorandum and study on revising Cal. Const. art. XXI relating to state boundaries, June 1966.
12. CAL. STATE LANDS COMMISSION, DISCUSSION OF THE CALIFORNIA-NEVADA STATE BOUNDARY (F. D. Uzes, Mar. 25, 1977). Discusses the determination of latitude and longitude, early surveys of both the meridian and oblique lines.

13. Act of Sept. 9, 1850, ch. 51, 9 Stat. 453. An Act to establish a Territorial Government for Utah.
14. Act of Mar. 2, 1861, ch. 83, 12 Stat. 209. An Act to organize the Territory of Nevada.
15. CONG. GLOBE, 37th Cong., 2d Sess. 1022, 1847, 2030, 2039, 2139, 3310, 3326, 3363, 3371 and app. 408 (1862). Bill extending the territorial limits of Nevada.
16. Act of July 14, 1862, ch. 173, 12 Stat. 575. An Act to extend the territorial Limits of the Territory of Nevada.
17. Nev. Const. Convention Debates and Proceedings, 466-67, 524-27, 538-41, 808-09 (July 19-21, 27 1864) [Official Report published 1866]. Relates to drafting of constitutional article on state boundaries.
18. NEV. CONST., art. XIV, § 1 (1864-65 Nev. Stats., ch. 35 at 60). State boundary description.
19. NEV. CONST., art. XIV, § 1 [no date supplied by California]. State boundary description.
20. 13 Stat. 749, Pres. Proc. No. 22 (1864). Nevada admitted to the Union.
21. Act of Mar. 16, 1864, ch. 36, 13 Stat. 30. An Act to enable the People of Nevada to form a Constitution and State Government, and for the Admission of such State into the Union on an Equal Footing with the original States.
22. Act of May 5, 1866, ch. 73, 14 Stat. 43. An Act concerning the Boundaries of the State of Nevada. This added one degree of longitude to the eastern boundary.
23. U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, BULL. NO. 12, BOUNDARIES OF THE UNITED STATES AND OF THE SEVERAL STATES AND TERRITORIES, WITH A HISTORICAL SKETCH OF THE TERRITORIAL CHANGES 125-29 (1885). The pages submitted detail boundaries of several western states including California and Nevada.
24. U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, BULL. NO. 171, BOUNDARIES OF THE UNITED STATES, AND TERRITORIES, WITH OUTLINE OF HISTORY OF IMPORTANT CHANGES 130, 132-37 (2d ed. 1900). Historical diagrams of several western states including Ne-

vada, and boundaries of said states including California.

25. U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, BULL. NO. 226, BOUNDARIES OF THE UNITED STATES AND OF THE SEVERAL STATES AND TERRITORIES WITH AN OUTLINE OF THE HISTORY OF ALL IMPORTANT CHANGES OF TERRITORY 135-39 (3d ed. 1904). Historical diagrams of several western states including Nevada, and boundaries of said states including California.

26. U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, BULL. NO. 689, BOUNDARIES, AREAS, GEOGRAPHIC CENTERS AND ALTITUDES OF THE UNITED STATES AND THE SEVERAL STATES 1-4, 202-25 (1923). Discussion of how boundaries are established and changed, describes historical boundaries of Nevada, California, and other western states.

27. U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, BULL. NO. 817, BOUNDARIES, AREAS, GEOGRAPHIC CENTERS AND ALTITUDES OF THE UNITED STATES AND THE SEVERAL STATES 1-14, 234-37, 242-44 (2d ed. 1930). Discussion of how boundaries are established and changed; describes boundaries of California and Nevada.

28. Letter from Nevada Territorial Governor Nye to Territorial Council, Oct. 25, 1861. Recommends appointing a commission to ask legislature of California to grant to Nevada that portion of her State lying east of the summit of the Sierra Nevada mountains.

29. J. Res. 2, 1st Sess., 1861 Nev. Terr. Laws 513-14. Resolution that board of two commissioners be elected to present reasons to California why boundary should be fixed at crest of Sierra Nevada mountains.

30. Second Annual Message of Gov. James W. Nye to the Legislature of Nevada Territory, 12-15 (typed), 32-35 (written copy), Nov. 13, 1862. Reports that California refused to cede territory west of Sierras, that the governor of California would recommend

joint survey. Nye recommends if cession not granted, to perform joint survey.

31. Con. Res. 6, 2d Sess., 1862 Nev. Terr. Laws 195. Resolution urging California Legislature to approve the western boundary of Nevada Territory as defined in the Organic Act and cede territory east of Sierras to Nevada.
32. First Annual Message of Nev. Gov. H. G. Blasdel, 1, 8, Dec. 14, 1864. Nevada's limits on the west are defined by the eastern boundary of California, unless through negotiations California will cede territory east of Sierras.
33. Reno Crescent, Apr. 6, 1872. Articles entitled "Our Northern Boundary", "Our Northern and Western Boundary", and "The Western Boundary of Nevada."
34. Nev. Assembly Bill 322, Mar. 10, 1951. An Act creating a joint interim legislative committee to investigate Nevada-California boundary problems, and to move the boundary to the summit of the Sierras.
35. Sacramento Bee, Feb. 12, 1959. Report that Nevada Assembly votes to demand 40,000 square miles of California returned.
36. L.A. Examiner, Feb. 19, 1959. Article entitled "Nevada Wants 'Peace'-of California."
37. Sacramento Bee, Feb. 19, 1959. Article entitled "Nevada Assembly Passes Bill to Push Line West, Sue California for Taxes."
38. THIS OFFER WAS WITHDRAWN. It was a letter from F. J. Hortig to Alan Cranston, and a letter from F. J. Hortig to Glenn M. Anderson. Concerns the description of the California-Nevada border.
39. Sacramento Bee, Mar. 1, 1959. Articles entitled "Nevada Claim to California Section Recalls Early Day Lassen Battle" and "Anderson Letter Review Land Row."
40. Santa Ana Register, Oct. 24, 1960. Article entitled, "Nevada Solon to Sue on Calif. Land."
41. THIS OFFER WAS WITHDRAWN. It was a memorandum from a Nevada Deputy Attorney General to

the Nevada Attorney General dated February 21, 1961. His opinion was that if Nevada undertook suit to regain land from east of Sierras, Nevada would lose.

42. Memorandum from Nevada Attorney General to Legislative Commission dated May 9, 1962. The memo legally concludes that Nevada would fail in an attempt to move their boundary west. One of the reasons is that "Nevada has long since acquiesced in the present location of the boundary."
43. CAL. S. JOUR., 12th Sess. at 630-31 (1861). Message from California Gov. Downey to California Senate concerning Nevada's quest for land east of the Sierras. His opinion California's boundary could only be changed by constitutional amendment.
44. Con. Res. 42, 13th Sess., 1862 Cal. Stats. 612. Nevada delegation to address California Senate and Assembly regarding establishment of boundary line.
45. [1856] CAL. SURV. GEN. ANN. REP. 22-25, 46-47, 112-15. Indicates uncertainty in locating county lines, necessity for defining eastern boundary of the state.
46. J. & Con. Res. 20, 1857 Cal. Stats. 377. Requesting Senators and Congressmen to procure from Congress a law providing for the survey of the eastern boundary of the state.
47. J. & Con. Res. 21, 1858 Cal. Stats. 356. Requesting senators and representatives be instructed to use influence to procure appointment of federal commissioner to act in conjunction with California commissioner to determine California-Utah boundary.
48. Con. Res. 12, 1859 Cal. Stats. 385. Exhibits 46 and 47 not having been acted on, request senators and representatives to communicate with the President regarding appointing of commissioners to determine boundary with Utah.
49. Con. Res. 1 & 2, 1860 Cal. Stats. — [page number not supplied by California]. California Congressional delegation requested to secure act for sur-

vey and establishment of eastern boundary within one year.

50. CAL. H. ASSEMBLY JOUR. 12th Sess. at 92, 98-99, 107, 904-05 (1861). Message from the Governor indicates that after Exhibit 48 was repealed, the United States appointed a Commissioner to survey the eastern boundary and they are now in the field. Requests the legislature to provide cooperation.

51. Con. Res. 4, 1861 Cal. Stats. 682. Joint committee to be appointed to take into consideration the report of the Surveyor-General on the eastern boundary.

52. [1862] CAL. SURV. GEN. ANN. REP. 22. If California were to adopt the Sierras as the boundary line, it could be established at less expense than the line as it now exists. It is up to the legislature to determine "whether the boundary suggested by the Act of Congress creating the Territory of Nevada shall be adopted, or whether it shall remain as was originally provided for this State." Concurs in Nevada governor's suggestion of joint commission to establish boundary between California-Nevada.

53. Sacramento Bee, Jan. 12, 1969. Article recounting 1864 boundary line war at Susanville.

54. Letter from Sheriff Naileigh of Roop County, Nevada to Orion Clemens, Secretary and Acting Governor of Nevada Territory, Feb. 18, 1863. Details the battle at Susanville and asks Clemens what to do.

55. Copy of proceedings of the Peace Meetings and Settlement at Susanville of the jurisdiction war, Feb. 16, 1863.

56. Letter from Orion Clemens, Acting Governor of Nevada Territory, to William Hill Naileigh, Sheriff of Roop County, Mar. 3, 1863. Clemens will try to get California to withdraw from east of the Sierras, but in the meantime the people should abide by the agreement made at the Peace Meeting, exhibit 55. Includes copies of telegraphs from Clemens to

Cal. Gov. Stanford Feb. 21, 1863; Stanford to Clemens, Feb. 27, 1863.

57. Letter from Orion Clemens, Acting Governor of Nevada Territory, to Leland Stanford, Governor of California, Mar. 5, 1863. Concerns the dispute at Susanville and suggests that "the matter of boundary may be speedily adjusted by the passage of an act recognizing the summit of the Sierra Nevada as the boundary line." If this is not feasible, Clemens suggests a joint survey.

58. Letter from Orion Clemens, Secretary and Acting Governor of the Territory of Nevada, to William H. Seward, Secretary of State, Mar. 18, 1863. Details the war at Susanville, previous maps and surveys, propositions resulting from a meeting with Gov. Stanford's agent including that there be a new survey. Clemens asks if the U.S. would reimburse Nevada Territory the cost of a survey run by Kidder and Ives.

59. Message of California Gov. Leland Stanford to Legislature of California, Mar. 30, 1863. Urges the legislature to settle the boundary line and includes report of Sheriff of Plumas County, Mar. 2, 1863; Report of Joint Committee at Susanville, Feb. 16, 1863; Letter of Governor Stanford to Judge Robinson, Mar. 4, 1863; Proposed Basis of Settlement From Gov. Clemens, Mar. 21, 1863; Report of Judge Robinson to Governor Stanford, Mar. 27, 1863.

60. Act of Apr. 18, 1859, ch. 291, 1859 Cal. Stats. 313. An Act to authorize the Governor of the State of California in conjunction with the United States, to run and mark the Boundary-Lines between the Territories of the United States and the State of California.

61. Act of Apr. 13, 1860, Ch. 222, 1860 Cal. Stats. 184. An Act to define and establish a portion of the Eastern Boundary of the State of California.

62. [1867-68] NEV. SURV. GEN. BIENNIAL REP. at 62. Indicates as soon as Nevada acquires all the territory she desires, she should have her boundaries sur-

veyed at the expense of the United States Government.

63. NOT RECEIVED IN EVIDENCE. The offered exhibit was a book—F. UZES, CHAINING THE LAND (1977).
64. [1900] U.S. COAST & GEODETIC SURV. REP. app. 3 at 255, 257, 259-330. C. SINCLAIR, OBLIQUE BOUNDARY LINE BETWEEN CALIFORNIA AND NEVADA. This report summarizes the various surveys of the oblique boundary line as well as detailing the U.S. Coast and Geodetic Survey's work on the oblique boundary line.
65. Notes of R. S. Williamson, Nov. 1, 1860. "Notes explanitory [sic] of the proper manner of conducting the survey of the Eastern boundary of California."
66. NOT RECEIVED IN EVIDENCE. Letter from W. Kingsbury to F. Weymouth, Dec. 22, 1933.
67. NOT RECEIVED IN EVIDENCE. Letter from A. Ireland to Thomas Kuchel, July 19, 1950.
68. NOT RECEIVED IN EVIDENCE. Letter from Wayne McLeod to Fred Ireland, July 19, 1950.
69. POLITICAL HISTORY OF NEVADA 1-105 (5th ed. 1965) (issued by J. Koontz, Sec. of State). Details historical and political data of the establishment of Nevada as a territory, and the boundary changes after Nevada became a state.
70. POLITICAL HISTORY OF NEVADA 22-105 (6th ed. 1974) (issued by W. Swackhamer, Sec. of State). Same as above.
71. Act of Apr. 27, 1863, ch. 402, 1863 Cal. Stats. 617. An Act to provide for Surveying and Establishing the Eastern Boundary of the State of California.
72. Act of Apr. 4, 1864, ch. 455, 1864 Cal. Stats. 506. An Act relating to the establishment of the Eastern Boundary of the State of California. Adopts the line as surveyed from Oregon to point near the White Mountains, south of Aurora as the legal boundary of California.
73. Act of Feb. 7, 1865, ch. 31, 1864-65 Nev. Stats. 133. An Act to provide for the Disincorporating of Cities and Towns incorporated under the Law of the Territory of Nevada.

74. Act of Mar. 10, 1865, ch. 121, 1864-65 Nev. Stats. 379. An Act to amend an act to authorize the survey and to establish the Western Boundary Line of the State of Nevada, approved Feb. 7, 1865. Survey to extend 70 instead of 30 miles, compensation rates changed.

75. 1943 Cal. Stats., ch. 134, art. 3 § 160 at 900. Adopts the north-south 1863 boundary and 1900 U.S.C&G.S. oblique boundary as legal boundary of state.

76. 1978 Cal. Stats., ch. 369 at 848-49. An Act amending Govt. Code § 160 (exhibit 75) and providing that the legal boundary is the line surveyed by Von Schmidt in 1872, from Oregon to 39th degree of latitude, and not the 1863 Houghton-Ives line.

77. Notes by James T. Gardner on the California Boundaries, Mar. 1872. Points out problems with the early surveys of the eastern boundary and northern boundary of California.

78. Letter from George H. Goddard to Prof. George Davidson, May 4, 1893. Goddard explains his survey of 1855 of Carson Valley. States that Lieut. Ives used his longitude, and that while Houghton thought he also used the same one, he used Goddard's camp, not astronomical station.

79. Notes by George H. Goddard on Errors contained in Sinclair's Report, (exhibit 64 herein) circa 1902.

80. Act of Mar. 26, 1861, ch. 94, 1861 Cal. Stats. 73. An Act to provide a Commissioner to co-operate with one appointed on behalf of the United States, to ascertain and mark a portion of the Eastern Boundary Line of this State.

81. Act of May 20, 1861, ch. 520, 1861 Cal. Stats. 587. An Act in relation to the Commission appointed on behalf of this State to run and mark the Eastern Boundary Line of the State of California.

82. Con. Res. 9, 12th Sess., 1861 Cal. Stats. 683. The two houses to elect a Commissioner to cooperate with the one provided by the U.S. to survey and mark the Eastern boundary line.

83. Sen. Misc. Doc. 18, 36th Cong., 1st Sess., (1860). Request from California that the United States survey and establish the eastern boundary.
84. Congressional Act of May 26, 1860, 12 Stat. 22. An Act to authorize the President of the United States in conjunction with the State of California, to run and mark the boundary lines between the Territories of the United States and the State of California.
85. CONG. GLOBE, 36th Cong., 1st Sess. 1620, 2046-47, 2302-03, 2357, 2375, 2408, app. at 475 (1860). Record of debates and proceedings on act in Exhibit 84.
86. Letter from J. Thompson, Secretary of General Land Office of Dept. of Interior, to Sylvester Mowry, Commissioner, Aug. 17, 1860. Instructions for surveying the Eastern boundary of California.
87. Letter from Caleb B. Smith, Sec. of the Dept. of Interior to Sylvester Mowry, Apr. 1, 1861. Mowry to discharge his employees and liabilities to best of ability; no further money will be advanced for the survey of the California boundary.
88. Telegraph (copy) from Caleb B. Smith to Sylvester Mowry. Mowry's services no longer required.
89. J. Thompson to J. G. Downey, Gov. of California, Aug. 17, 1860. Explains instructions given to Mowry and encloses a copy. It seems imperative to start at the Colorado River to insure the greatest accuracy.
90. Letter from L. Upson, U.S. Surv. Gen. of Cal., to F. F. Low, Gov. of Cal., June 3, 1864. Upson says he understands California and Nevada have authorized a survey of the boundary line and he requests a report so the government can adopt the work and be spared expense.
91. Letter from J. F. Houghton, Surv. Gen. of Cal., to W. L. Upson, U.S. Surv. Gen. of Cal., June 9, 1864. The survey has been suspended in an incomplete state and there is no appropriation for making copies of the maps or notes made to date.
92. Virginia City Territorial Enterprise, Mar. 18, 1871. Reports Nevada governor vetoed bill authorizing

survey of Cal.-Nev. border and appropriating money for survey.

93. S. J. Res. 37, 5th Sess., 1871 Nev. Stats. 187. Asks California to cede the territory east of the summit of Sierras to Nevada.

94. Act of Mar. 7, 1873, ch. 107, 1873 Nev. Stats. 180. An Act to provide for the removal of the county seat of Esmeralda County.

95. 14 Nev. Stats. 465 (1867). Congressional provision for survey of 42nd parallel not to exceed $13,847.00.

96. Contract and Bond between Joseph Wilson, Commissioner of General Land Office and Daniel G. Major for the survey of the Oregon-Idaho, Oregon-California Boundaries, Oct. 1, 1867.

97. Daniel Major's Astronomical Observations, Reductions and Field Notes of the Survey of the California and Oregon Boundary Line, June 16, 1870. Includes a cover letter from Major to Joseph Wilson, Commissioner, and a certificate of acceptance signed by Wilson, June 17, 1860.

98. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EXEC. DOC. NO. 1, Part 4, 41st Cong., 3d Sess. 465-66 (1870). Includes a report by the Commissioner of the General Land Office on the boundary lines of California, including the survey by Major.

99. [1869-1870] NEV. SURV. GEN. REP. at 16-17. Reports the boundaries of the state seem permanent; approximately 220 miles of the oblique line on the western boundary have not been surveyed.

100. REPORT OF THE SUPERINTENDENT OF THE U.S. COAST SURVEY FOR 1872, H.R. EXEC. DOC. NO. 240, 42d Cong. 3d Sess. 40-41, app. 9 at 173-76 (1875). Reports on George Davidson's observations at Summit station and Verdi, Nevada, and attaches his report on the country, climate, and observations.

101. REPORT OF THE COMMISSIONER OF GENERAL LAND OFFICE FOR 1871 (1872) at 21-22. Details the difficulties with the prior surveys of the eastern boundary of California and recommends an expenditure of $41,250 for a new survey.

102. Letter from Willis Drummond, to A. W. Von Schmidt, July 11, 1872. Enclosing contract, bond and other documents pertaining to his surveying the eastern boundary of California.

103. Letter from Willis Drummond to Allexey W. Von Schmidt, Aug. 2, 1872. Acknowledges return of contract, bond, and special instructions and sends certified copy of the same with extract from field notes made by Daniel G. Major.

104. Act of June 10, 1872, ch. 415, 17 Stat. 347. Appropriates $41,250 for a survey of the eastern boundary of California.

105. Letter from Allexey Von Schmidt to Willis Drummond, Feb. 27, 1873. Report of his survey of the eastern boundary of California.

106. Letter from A. W. Von Schmidt to Willis Drummond, Apr. 4, 1873. Letter in defense of his work on the survey of the eastern boundary of California.

107. Letter from A. W. Von Schmidt to Willis Drummond, Nov. 27, 1872. Explains difficulties incurred in surveying California's eastern boundary between the 42° and 39° north latitude, and requests payment for that part of the survey. Includes a rough map of this portion of the line.

108. Letter from Willis Drummond to A. W. Von Schmidt, Aug. 29, 1872. Von Schmidt instructed not to rely on the data of any other astronomer or surveyor except the establishment of the northeast corner of California by Daniel Major. Von Schmidt is to make his own observations and deductions.

109. Letter from S. S. Burdett, Commissioner of General Land Office, to Register of U.S. Land Office, Sacramento, Cal., Feb. 18, 1875. Register directed to suspend disposals of certain townships as a result of Von Schmidt survey.

110. Letter from S. S. Burdett to James T. Stratton, U. S. Surveyor General of California, Feb. 17, 1875. Stratton directed to furnish Surveyor General of

Nevada additional diagrams showing fractional areas of lots along line surveyed by Von Schmidt.

111. Letter from Willis Drummond to E. S. Davis, U.S. Surveyor General of Nevada, Feb. 14, 1874. Transmits field notes of Von Schmidt survey and instructed Davis to make changes on plats in accord with survey.

112. Letter from S. S. Burdett, to E. S. Davis, Feb. 17, 1875. Refers to exhibit 110 and requests Nevada to show the fractional areas of the lots belonging to the government along the boundary line.

113. Letter from James T. Stratton to Willis Drummond, Feb. 26, 1874. Acknowledges receipt of exhibit 110.

114. [1871-1872] NEV. SURV. GEN. REP. at 7-8. Reports an error was discovered in the oblique line, money has been appropriated for a new survey.

115. THIS EXHIBIT WITHDRAWN. Duplicate of Exhibit 130.

116. Letter from George Davidson to Prof. Benjamin Peirce, Aug. 6, 1872. Davidson says his field work of determination of the 120th meridian near Verdi, Nev. completed, requests that the office computations be completed as soon as possible.

117. Letter from George Davidson to Prof. Benjamin Peirce, Jan. 12, 1872. Acknowledging receipt of instructions for work at Verdi, Nevada.

118. Letter from George Davidson, to Prof. Benjamin Peirce, Jan. 3, 1872. Transmitting request that the Survey determine the 120th meridian which Davidson indicates he is prepared to undertake if Peirce desires.

119. Letter from Benjamin Peirce to George Davidson, Ass't. U.S. Coast Survey, Jan. 9, 1872. Davidson to determine the geographical position of Verdi. [This appears to be a draft of Exhibit 120].

120. Letter from Benjamin Peirce to George Davidson, Jan. 9, 1872. Similar to Exhibit 119.

121. Letter from Benjamin Peirce to George Davidson, Sept. 3, 1872. Approves communicating approxi-

mate results of work at 120th meridian to Von Schmidt.

122. Letter from Benjamin Peirce to George Davidson, Jan. 24, 1873. Peirce has requested that the General Land Office be supplied with the results of Davidson's observations near the 120th meridian at the earliest time.

123. Letter from Charles A. Schott, Asst. in Charge of the Computing Division, U.S. Coast and Geodetic Survey, to B. A. Colonna, Asst. in Charge Office & Topography, July 17, 1889. Reports that a comparison of data taken for the longitude at Verdi, Nevada in 1872 and 1889 show "extremely close accord."

124. Notes of longitude comparison at Verdi, Nevada, prepared by Charles A. Schott, July 17, 1889 referred to above in Exhibit 123.

125. Letter from J. D. Whitney, State Geologist of Cal., and Clarence King, U.S. Geologist, to Prof. B. Peirce, Dec. 2, 1871. Letter requesting a determination of the 120th meridian, and suggesting Verdi as the station.

126. San Francisco Daily Alta California, Aug. 10, 1872. Reports Davidson's observations indicate that boundary line between California and Nevada must be moved east; that determination of 120th meridian by late observations is fully two miles in error.

127. Letter from A. W. Von Schmidt to Willis Drummond, Dec. 19, 1872. Von Schmidt reports that he is having the necessary field notes and maps prepared relating to the survey between the 39th and 42nd degrees of north latitude.

128. Letter from Willis Drummond to A. W. Von Schmidt, Dec. 9, 1872. Indicates that there is no impediment to payment for each part of the boundary line separately and to transmit field notes, maps, and astronomical data relating to the portion from the 42nd to 39th parallel.

129. Letter from Willis Drummond to A. W. Von Schmidt, Mar. 22, 1873. Acknowledges receipt of

Von Schmidt's report, field notes, and maps for the boundary between the 39th and 42nd parallel, and criticizes his lack of astronomical observations.

130. Letter from Willis Drummond to A. W. Von Schmidt, May 1, 1873. This is a response to Exhibit 106, and criticizes lack of observations for correct determination of time.

131. Telegram from A. W. Von Schmidt to Willis Drummond, Aug. 13, 1872. Requests permission to start from Davidson's point at Verdi and run north to Oregon.

132. Letter from A. W. Von Schmidt to Willis Drummond, Aug. 14, 1872. Elaborates on Exhibit 131 pertaining to Davidson's establishment of the 120th meridian.

133. Original Contract, Bond and Special Instructions from Willis Drummond, Commissioner of General Land Office, to Allexey W. Von Schmidt, July 20 & 31, 1872. Instructions as to the surveying of the California-Nevada boundary.

134. Letter from Willis Drummond to E. S. Davis, U.S. Surveyor General of Nevada, Apr. 21, 1873. Reports that Von Schmidt's survey from the 39th to the 42nd parallel is farther east than the 1863 line and he is to refrain from letting contracts in the immediate vicinity of the boundary line until further advised.

135. Nevada State Journal, Apr. 12, 1874. Reports that Von Schmidt's survey has been accepted by the General Land Office and Nevada must acquiesce in the loss of property.

136. Nevada State Journal, May 16, 1874. Reports the Controller to the Assessor in four Nevada counties has received notice from the state controller to respect the Von Schmidt survey in making their assessments.

137. Act of Feb. 26, 1875, ch. 50, 1875 Nev. Stats. 102-03. An Act to better define and establish the boundary line between the County of Nye and the Counties of Churchill and Esmeralda.

138. [1873-1874] NEV. SURV. GEN. REP. at 7-9. Includes correspondence received by the U.S. Surveyor General of Nevada showing the General Land Office's acceptance of the Von Schmidt survey.

139. Nevada Map Atlas, Nevada State Highway Department (dates vary for individual quadrangle maps).

140. Act of Mar. 1, 1887, ch. 94, 1887 Nev. Stats. 95-96. An Act to authorize the purchase of maps of the State of Nevada for the use of the public schools therein, and making an appropriation to pay for the same.

141. Letter from Edwin A. Sherman to California Gov. Leland Stanford, Oct. 5, 1863. Reports unrest in area of Aurora with respect to the oblique boundary and requests him to set forth the opinions he entertains and the course he intends to pursue in regard to the jurisdiction of California.

142. [1867-1869] CAL. SURV. GEN. REP. at 12-13. Reports about 290 miles of the oblique boundary are yet to be run.

143. Telegram from A. W. Von Schmidt to Willis Drummond, Apr. 1, 1873. Will begin survey in 10 days.

144. Letter from A. W. Von Schmidt to Willis Drummond, Oct. 9, 1873. States that upon his arrival at the Colorado River he found the river had shifted since Lieut. Ives' 1863 sketch, and encloses Ives' sketch and his own sketch of the river. Inquires whether he should recognize the old river channel or the new one as the intersection.

145. Letter from Willis Drummond to A. W. Von Schmidt, Oct. 22, 1873. Von Schmidt instructed to consider the intersection of the 35th degree of north latitude with the middle of the channel of the Colorado River as he now finds it.

146. Letter from Allexey W. Von Schmidt to Willis Drummond, Jan. 10, 1874. Von Schmidt's report on the oblique line.

147. CAL. S. & ASSEMBLY JOUR., app. vol. VI, 20th Sess. Report and Supplemental Report of a Majority of Border County Delegations, on Joint Resolution of Legislature of Nevada, asking the Cession of Terri-

tory East of the summit of the Sierra Nevadas (1874). Recommends no action on Nevada's request.

148. Letter from A. W. Von Schmidt to Willis Drummond, Sept. 3, 1873. Reports he has just completed field work on the oblique line and requests an extension of six months time to prepare his maps, report and field notes in triplicate.

149. Letter from A. W. Von Schmidt to Willis Drummond, Nov. 6, 1873. Reports that the line surveyed and marked in the field runs to the middle of the channel as found by him 143 chains west of the monument established by Lieut. Ives.

150. Letter from Willis Drummond to A. W. Von Schmidt, Jan. 31, 1874. Von Schmidt's request for payment has been forwarded to the Treasury.

151. San Francisco Call, Supplement, May 1, 1884. Reports there has been discontent with Von Schmidt's oblique line, and that if any error exists it is in the running of the boundary lines, not the determination of the initial meridian.

152. Letter from M. M. Macomb, United States Engineer Office, to Wm. Ham. Hall, California State Engineer, Apr. 11, 1882. Indicates he has done topographical work on a map of Lake Tahoe and has no doubt that there is a serious error in the running of the oblique line, "although the 120th Meridian just north of the Lake and in the vicinity of Verdi, is as nearly correct as could be expected."

153. Letter from Wm. Ham. Hall to California Senator J. F. Miller, Apr. 30, 1884. Hall indicates there is no dispute as to the meridian line, but he discovered that the oblique line as marked on the ground does not intersect the point of crossing of the 120th meridian and 39th parallel latitude, but strikes parallel about a mile west from said point.

154. Letter from H. M. Teller, Secretary of the Interior, to President of the Senate Pro Tempore, Apr. 25, 1884, transmitting a report by N. C. McFarland, Commissioner of the General Land Office. McFar-

land says he has no knowledge of the existence of any alleged error with regard to the oblique boundary line, and the only further method of testing the correctness of the work would be by an examination in the field and new astronomical observations.

155. Assembly Con. Res. 9, ch. 9, 1884 Cal. Stats. 10. Because the oblique boundary line is not a straight line but a broken one and in some places monuments are more than a mile from the true boundary line, it is resolved that their senators and representatives be instructed and requested to procure action to secure the services of engineers to locate the true boundary line.

156. S. J. Res. 27, ch. 29, 1891 Cal. Stats. 536. A state survey shows the oblique line is wrong and California delegation in Congress requested to take such action as will secure the correct establishment of the line.

157. Act of Feb. 26, 1889, ch. 31, 1889 Cal. Stats. 38. An Act to provide for the correction and establishment of a portion of the eastern boundary line of the State of California, and to appropriate money therefor.

158. Letter from George Davidson, to California Gov. R. W. Waterman, Apr. 19, 1889. Davidson's reflections on Von Schmidt's boundary line and any new survey.

159. Letter from George Davidson to F. M. Thorn, Supt. of U.S.C. & G Survey, Mar. 27, 1889. Davidson's history of the boundary survey including how he showed Von Schmidt to make the computations for the oblique line.

160. Letter from George Davidson to F. M. Thorn, Supt. of U.S.C. & G Survey, Mar. 28, 1889. Davidson relays his conversation with A. W. Von Schmidt, who has told him that there is no possibility of such an error and that he is willing to make a resurvey at his own expense if any reliable authority can show him he committed an error.

161. [1888-1890] CAL. SURV. GEN. REP. 14-40. This is the report of surveyors Grunsky and Minto who were appointed by the California Surveyor General to see if there was any error in the position of the boundary at Lake Tahoe, and their conclusion that the boundary as marked is incorrect.

162. 27 Stat. 357 (1892)—appropriating $15,650 for furnishing points to state surveys and for surveying and designating with permanent monuments the oblique boundary between California and Nevada.

163. Assembly J. Res. 10, ch. 18, 1899 Cal. Stats. 490. Resolved that congressional delegation be requested to seek authorization to move old granite markers over to resurveyed line or if that is too expensive that the temporary posts set by the United States Coast and Geodetic Survey on the oblique line be recognized as the true boundary.

164. [1891-1892] NEV. SURV. GEN. REP. 8-9. Directs the Nevada legislature's attention to the appropriation of money by Congress for a survey of the oblique line.

165. [1899] U.S. COAST & GEODETIC SURVEY REP. 66, 779. Mentions Davidson has reported an apparent error in the determination of the eastern boundary line of California where it reaches Lake Tahoe at the north shore and leaves it at the southeast shore.

166. [1893] U.S. COAST & GEODETIC SURVEY REP. 66-67. Report on the progress of the resurvey of the oblique line.

167. [1895] U.S. COAST & GEODETIC SURVEY REP. 56-59. Report on the progress of the resurvey of the oblique line.

168. [1898-1899] U.S. COAST & GEODETIC SURVEY REP. 223-25. Says work for the season on the oblique line comprised 130 miles of triangulation and 400 miles of boundary line corrected.

169. Letter from George Davidson to Thomas C. Mendenhall, Supt. U.S.C. & G.S., July 24, 1889. Davidson reports he has been unofficially informed that some "curious errors have been discovered at the

turning of the boundary line on the shore of Lake Tahoe."

170. Letter from George Davidson to Thomas C. Mendenhall, Dec. 20, 1889. Davidson requests information about the oblique line and says he understands it is over 4,000 feet in error.

171. Letter from C. H. Sinclair, Asst of U.S.C. & G.S. to Henry S. Pritchett, Supt. U.S.C. & G.S., Feb. 16, 1899. Reports that Von Schmidt did not correct his line all the way back from the Colorado and that they crossed Von Schmidt's line twice.

172. Letter from George Davidson to Thomas C. Mendenhall, Nov. 17, 1890. Annual report for fiscal year ending June 30, 1890. Reports that an examination and observations authorized by California made by competent engineers indicates an error in the boundary line where it reaches Lake Tahoe at the north shore and leaves it at the southeast shore.

173. Letter from George Davidson to Thomas C. Mendenhall, Sept. 30, 1893. Annual Report for 1892-93. Details the beginning of the work of the Coast and Geodetic Survey on the oblique boundary.

174. Letter from C. H. Sinclair to T. C. Mendenhall, Aug. 28, 1893. Annual report for the year ending June 30, 1893. Details field work done on the oblique boundary line, beginning at the Colorado River.

175. [1894-1896] CAL. SURV. GEN. REP. 15-20. Details correspondence between U.S.C. & G.S. and California Governor's office regarding permanent marking of the boundary. The Coast Survey has one more season's work, and will probably go over the line for the last time in February 1897.

176. Letter from C. H. Sinclair to Henry S. Pritchett, Jan. 20, 1898. Report of field work connecting the longitude stations at Genoa, Carson City, Virginia City and Verdi with the primary triangulation.

177. 1901 Cal. Stats. 89. This adopts the line established and marked by the U.S. Coast and Geodetic

Survey as the true, correct and legal boundary line of the State of California.

178. 1903 Nev. Stats. 38. This adopts the line established and marked by the U.S. Coast and Geodetic Survey as the true, correct and legal boundary line of the State of Nevada.

179. 1960 Nev. Stats. 145-51. Ratification of the interstate compact between Nevada and Arizona, and text of compact.

180. Act of Aug. 11, 1966, Pub. L. No. 89-531, 80 Stat. 340. An Act to consent to the interstate compact defining the boundary between the States of Arizona and California, and setting forth the compact.

181. Act of June 16, 1961, Pub. L. No. 87-50, 75 Stat. 93. An Act Giving the consent of Congress to a compact between the State of Arizona and the State of Nevada establishing a boundary between those States.

182. 1959 Nev. Stats. 123-25. Nevada act creating the Colorado River boundary commission to confer and act with representatives of Arizona to determine the location of the common boundary and negotiate compact.

183. 1977 Nev. Rev. Stats. § 234.010-234.250. Chapter 234 relating to State and Local Government Boundaries.

184. U.S. DEP'T COMMERCE, ENVIRONMENTAL SCIENCE SERVICES ADMIN., COAST & GEODETIC SURVEY, BULL. NO. 27, SURVEY OF THE BOUNDARY BETWEEN ARIZONA AND CALIFORNIA 10-13 (1965).

185. Interstate Compact Defining the Boundary Between the States of Arizona and California.

186. Act of Sept. 28, 1850, ch. 53, 9 Stat. 513-515. Act adopting the meridian of the observatory at Washington for all astronomical purposes.

187. 1873-74 Rev. Stat. § 435. Same as the above session law.

188. CONG. GLOBE, [information for citation not supplied by California] 891-2, 1917 (1850). Relates to the passage of an act for an American meridian.

189. [1865] NEV. SURV. GEN. REP. 1, 14-15. Description of state's boundaries show that Washington and Greenwich meridians considered identical.

190. [1885-1886] NEV. SURV. GEN. REP. 1. Same as above.

191. J. KELLY, FIRST DIRECTORY OF NEVADA TERRITORY 2, 25-28, 45-46 (1862) including H. DEGROOT'S SKETCHES OF THE WASHOE SILVER MINES 1, 6, 16, 24 (1860) [1962 reprint of original]. This also indicates the American and Greenwich meridians corresponded, as well as giving detail about the territory and county boundaries.

192. Map of Nevada Territory, DeGroot 1863.

193. Map of Oregon and Upper California, based on Fremont surveys, drawn by Preuss 1848.

194. [1879-1880] NEV. SURV. GEN. REP. 3. Same information as 189.

195. [1883-1884] NEV. SURV. GEN. REP. 3-4. Same information as 189.

196. [1875-1876] NEV. SURV. GEN. REP. 3. Same information as 189.

197. [1877-1878] NEV. SURV. GEN. REP. 3-4. Same information as 189.

198. [1881-1882] NEV. SURV. GEN. REP. 3-4. Same information as 189.

199. Map of State of Nevada, Dept. of Interior, General Land Office, compiled by A.F. Dinsmore, 1886.

200. Culley, *Meridians of Washington*, 3 GEODETIC LETTER, U.S.C. & G.S. (No. 1) 56 (1936). Details the different meridian lines of Washington including the center of the dome of the old U.S. Naval Observatory, the White House, and the Capitol.

201. 37 Stat. 342 (1912). Act repealing the meridian of Washington.

202. Map of the eastern boundary of California as surveyed by A. W. Von Schmidt, drawn by Von Leicht & Hoffman, 1873.

203. Map of Nevada, Dept. of Interior, General Land Office, 1876.

Appendix

204. Post Route Map of California and Nevada, U.S. Post Office, 1917.
205. Map of Nevada compiled by J. Parker, U.S. Surveyor General's Office, Reno, Nevada, 1886.
206. Map of Oblique Boundary between California and Nevada, Treasury Dept., U.S. Coast & Geodetic Survey, C. H. Sinclair & Assistants, 1899.
207. Nevada Taxation Boundaries Map # 16, Washoe County 1969.
208. Nevada Taxation Boundaries Map # 70, Washoe County 1974.
209. Strip Map of California-Nevada Boundary, depicting lines in issue and federal grants of record.
210. Letter from R. P. Hammond, Jr., U.S. Surveyor General for California, to Commissioner of General Land Office, Jan. 20, 1887. Transmits a letter from the land agent of the Central Pacific R.R. Co. requesting a survey of the boundary line between California and Nevada in township 19 N. Range 18 E. Mount Diablo Meridian. Enclosure attached which indicates this township has not been resurveyed since 1863 line.
211. Letter from R. P. Hammond to Commissioner, General Land Office, Mar. 3, 1887. A notice has been posted inviting bids for resurvey of township mentioned in Exhibit 210.
212. Letter from R. P. Hammond, Jr. to Commissioner, General Land Office, Apr. 16, 1887. No bids on resurvey mentioned in Exhibits 210 & 211 were received.
213. Letter from Charles W. Irish, U.S. Surveyor General for Nevada, to S. M. Stockslager, Commissioner of General Land Office, Apr. 17, 1888. Irish states he has discovered several plats showing only the old boundary line and that property has been disposed of on land which now lies in California, and asks for suggestions or instructions.
214. Letter from Britton & Gray law firm to W. M. Stone, Acting Commissioner of the General Land Office, July 10, 1889. Lists the lands selected by California as indemnity school lands for those lost

in certain townships, states that the selection has been suspended because a new boundary line was to be run but has only connected with the lines of survey in part. Requests connection of lines of new boundary to determine whether California's claim valid.

215. Letter from R.P. Hammond, Jr., U.S. Surveyor General for California, to Commissioner of General Land Office, Feb. 17, 1890. Reporting present status of public surveys adjoining east boundary of California run by Von Schmidt, and an estimate of the cost of making proper connections with the boundary in townships.

216. Dept. of Interior decision in the case of Ernest M. Pellkofer, Case No. A-29832. Appeal from a decision which had found that the Bureau of Land Management did not have jurisdiction over land now in Nevada along the oblique line because it had passed to California under the school land grant. After historically detailing the surveys and boundary problems, the original decision is set aside and the case remanded.

217. Letter from J. A. Williamson, Commissioner of General Land Office, to E.S. Davis, U.S. Surveyor General of Nevada, Nov. 12, 1877. Davis instructed to prepare an amended plat of the area along the new oblique boundary line as found by Von Schmidt.

218. Letter from J. A. Williamson to Register of U.S. Land Office, Carson City, Nev. Nov. 12, 1877. To suspend all disposals of land in certain section along oblique boundary and report a list of the lands which have been disposed of in said sections.

219. Letter from J. A. Williamson to Register of U.S. Land Office, Carson City, Nev., Jan. 24, 1878. Acknowledgement of Register's response to Exhibit 218.

220. Letter from W. M. Stone, Asst. Commissioner of General Land Office, to R. P. Hammond, Jr., Dec. 17, 1889. Encloses exhibit 214, and requests Ham-

mond to report the number of townships in California through which the Von Schmidt boundary was extended, and the townships where public surveys were not connected.

221. Letter from Edward A. Borriss, Assistant Commissioner of General Land Office, to U.S. Surveyor General, Reno, Nev., Dec. 14, 1894. Refers to closings and plats along the "new" boundary line.

222. Letter from W. M. Stone to R. P. Hammond, Jr., Mar. 1, 1890. Stone indicates he has received the report requested in Exhibit 220 and that it is not contemplated at present to make all of the requisite connections but those only of surveyed and approved townships.

223. Letter from W. W. Curtis, Acting Commissioner of the General Land Office, to Register and Receiver, Sacramento, Cal., Sept. 1, 1875. Directing suspension of disposal of all lands in certain townships.

224. Letter from J. A. Williamson to H. G. Rollins, U.S. Surveyor General of California, Apr. 4, 1877. Rollins instructed to furnish the Surveyor General for Nevada plats of Townships 21 and 24, and the Surveyor General of Nevada has been instructed to send Rollins information on the disposal of lands in Nevada.

225. Letter from J. A. Williamson to J. W. Ames, U.S. Surveyor General, California, Nov. 12, 1877. Ames inquires whether a plat of Township 20 was furnished to the Nevada Surveyor General.

226. Letter from J. A. Williamson to Register, U.S. Land Office, Susanville, Cal., Nov. 12, 1877. If plat of Township 20 has been received, Register not to dispose of any of said lands until further order and until official information received as to whether any of these lands were disposed of by Nevada.

227. Letter from J. A. Williamson to E. S. Davis, Apr. 4, 1877. Williamson states that California Surveyor General's office to furnish Davis with plats of Townships 21 and 24 and Davis is to prepare amended plats showing tracts disposed of lying west of the new state boundary.

228. Letter from J. A. Williamson to Register & Receiver, Susanville, Cal., Jan. 16, 1878. Encloses map showing tracts disposed of by Nevada in Township 20 which lie between the old and new state lines.

229. Letter from S. S. Burdett to Register of U.S. Land Office, Carson City, Nev., Feb. 18, 1875. Directs Register to suspend disposition of lands in certain listed sections. Corresponds to Exhibit 109 which was directed to the Register of the U.S. Land Office at Sacramento.

230. Letter from W. W. Curtis to Register & Receiver, Carson City, Nev., Aug. 31, 1875. Directing suspension of disposal of all lands in certain townships and that a list of all lands previously disposed of be prepared. Corresponds to Exhibit 223 sent to Sacramento Register.

231. Letter from J. A. Williamson to E. S. Davis, Nov. 12, 1877. Corresponds to Exhibit 225 of same date. Directs Davis to prepare amended plat when receives information from California, designating by lot fractions not disposed of.

232. [1909-1910] NEV. SURV. GEN. REP. 27. Reports that almost all lands given to the state by the general government have been sold, but there are about 2000 acres which were patented to Nevada and now lie in California for which they will still receive applications for sale.

233. Letter from Francis D. Eickbush, Acting Chief, Branch of Cadastral Survey, Bureau of Land Management, to State Lands Division, Sacramento, California, Nov. 13, 1978. Eickbush asks the land status of a certain school section.

234. Letter from F. D. Uzes to Francis D. Eickbush, Nov. 21, 1978. Response to Exhibit 233. The section was located in California under the Von Schmidt survey, and in Nevada after the Coast & Geodetic Survey. It remains identified on their records as a fractional section of California school land.

Appendix

235. [1919] DEPT. OF INTERIOR REP. vol. I at 247. Comments from the annual reports of the surveyors general of Arizona, California, Nevada.
236. Map of School and Selection Lands of California-Nevada, North Shore of Lake Tahoe. This consists of one large color map, and a smaller 8 1/2" × 11" black & white duplication.
237. Map of School and Selection Lands of California-Nevada, South Shore of Lake Tahoe. This consists of one large color map, and a smaller 8 1/2" × 11" duplication.
238. Affidavit of Fred Sledd, Jan. 10, 1979. On the north-south boundary between an imaginary line drawn from Major's Corner and Von Schmidt's line, California acquired 34,040 acres from the general government, and Nevada acquired 3,433 acres. On the oblique line, between the easternmost portions of the Von Schmidt line and the Coast and Geodetic line and an imaginary line projected from Major's Corner, Nevada acquired 5,022 acres and California 13,894 acres all as depicted in Exhibit 209.
239. NOAA Technical Memorandum NOS NGS 18, Determination of Astronomic Positions for California-Nevada Boundary Monuments Near Lake Tahoe, Mar. 1979. Report on 1978 determination of astronomic position of three boundary monuments.
240. Affidavit of F. D. Uzes, May 3, 1979. This is in response and rebuttal to Mr. Landrum's statement (Nevada Exhibit LLLLL), concerning Exhibit 239.

The following answers to interrogatories were introduced by California from Defendant's Answer to First Set of Interrogatories, Filing # 1A, and received into evidence: 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 47, 48, 49, 50, 51-53.

The following answers to interrogatories were introduced by California from Defendant's answer to Plaintiff's Second Set of Interrogatories, Filing # 8, and received into evidence: 4(a), 4(b), 4(c), 7, 8, 10, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 42-46 (the court reporter's notes show 43-46, the clerk's notes show 42-48, and my notes show 42-46 which I have used in preparing this list, although it makes no difference in the ultimate findings), 49-51, 52, 53-64.

Also offered and received into evidence were California's entire Second Request for Admission, Filing # 9B, and Nevada's Answer thereto, Filing # 12.

B. Summary Of Nevada Exhibits, and Other Evidence

A. Large color photograph of Major's monument.

B. Small color photograph of Major's monument showing the top stone with inscription "Nevada."

C. Small color photograph of Major's monument showing close-up the top stone with the inscription "Nevada."

D. Large color photograph of Von Schmidt monument.

E. Large color photograph of Von Schmidt monument.

F. Large color photograph of Von Schmidt monument stone inscribed:

1872

A. W. Von Schmidt

Lon. 120. Lat. 42

G. Cal. Const. Convention Debates, 466-67, memorial at XIV-XXIII (Sept.-Oct. 1849). Details history of California, the debate on the constitution. Indicates the present boundary was adopted as a compromise.

H. S. REP. NO. 123, 31st. Cong., 1st Sess. 1-26 (1850). Report by Senator Clay indicates that the committee favors admitting California with the present boundaries and if thereafter "it should be found conducive to their convenience and happiness to form a new State out of California, we have every reason to believe, from past experience, that the question of its admission will be fairly considered and justly decided." Also recommends establishment of territorial governments for the residue of the territory derived from Mexico. Included as a part of the report is the bill to admit California as a state in the union.

I. CONG. GLOBE, 31st Cong., 1st Sess. 891-92 (Pt. 1), 1916-17 (Pt. 2) (1850). Duplicate of California Exhibit 188.

J. H.R. REP. NO. 286, 31st Cong., 1st Sess. 1-70 (1850). Report on American Prime Meridian. This includes correspondence received by Lieut. Davis, Supt. of the American Nautical Almanac on whether an American prime meridian should be established.

K. Duplicate of California Exhibit 186.

L. Duplicate of California Exhibit 14.

M. Duplicate of California Exhibit 21.

N. Duplicate of California Exhibit 20.

O. Duplicate of California Exhibit 18.

P. Duplicate of California Exhibit 22.

Q. Synoptical Index, U.S. Law & Treaties, Mar. 4, 1789-Mar. 3, 1851 at 163. Index of laws relating to boundaries.

Appendix

R. Letter from Commissioner of General Land Office to Director, U.S. Geological Survey, Dec. 21, 1899. Lists the state and territorial boundary lines run under the auspices of the General Land Office. Relevant boundaries include: Major's 1873 survey of north boundary of Nevada on 42nd degree of north latitude, 1868-69 survey of north boundary of California at 42nd degree of north latitude, and the 1872-73 survey by Von Schmidt of California-Nevada boundary.

S. Included in California Exhibit 161.

T. Duplicate of California Exhibit 162.

U. Duplicate of California Exhibit 166.

V. Duplicate of California Exhibit 175.

W. Message of Nevada Gov. Reinhold Sadler to 1901 Legislature, 12th Sess., at 10-13. Includes a letter from Sadler to Supt. of U.S. Coast & Geodetic Survey indicating that the State of Nevada has never officially recognized the U.S. Coast & Geodetic Survey line.

X. Message of Nev. Gov. Reinhold Sadler to 1903 Legislature, 21st Sess. at 4-7. California has already adopted the oblique line run by the Coast Survey, and the question remains open whether the Nevada Legislature should adopt it.

Y. 30 Stat. 606 (1898). $10,000 appropriated for surveying and temporarily marking that portion of the eastern boundary of California known as the oblique line.

Z. Duplicate of California Exhibit 178.

AA. Duplicate of California Exhibit 232.

BB. Duplicate of California Exhibit 75.

CC. Included in Nevada Exhibit BB, and California Exhibit 75.

DD. CAL. CONST. OF 1879, art. III, § 2 (as amended 1972).

EE. Cal. Const. Revision Commission, art. XXI recommendations and provisions (1970) at 3, 37, 39-42. Details proposed changes in constitutional article relating to boundaries.

FF. Amendment to Cal. Govt. Code § 160, approved July 10, 1978. Provides that the boundary of the state shall be the line surveyed by Von Schmidt in 1872 between the 42nd and 39th parallels of latitude, and the line surveyed by the U.S. Coast & Geodetic Survey and completed in 1900 for the oblique boundary line.

GG. Duplicate of California Exhibit 181.

HH. Letter from J. D. Whitney, California State Geologist, to California Gov. F. F. Low, Nov. 25, 1867 at 1, 6-15. Report for the years 1866-67 states that there were no even approximately correct maps of any part of the state, so first had to work out geography, and then geology. Astronomical observations will have to be taken before they can prepare an even tolerable map of the state, "as there are errors and discrepancies in the work of the United States Land Office which can only be cleared up by a careful series of astronomical observations."

II. Letter from J. D. Whitney to California Gov. H. H. Haight, Nov. 15, 1869 at 1, 4-7. Report on the condition of the Geological Survey of California for the years 1868-69. Details maps and other publications ready for print.

JJ. Duplicate of California Exhibit 184 with the addition of p. iii (Forward) and 17.

KK. 20 Stat. 128 (1878). Provides for payment to the widow of Joseph C. Ives the $804 due him.

LL. 9th Census, Bureau of Census, Washoe County (1870). Lists each person, their occupation, place of birth.

MM. Act of June 8, 1868, ch. 55, 15 Stat. 67 (1868). Relates to selection of lands by California and Nevada.

NN. GENERAL LAND OFFICE, DEP'T OF INTERIOR, LAND SERVICE BULL. Vol. 12, No. 6 (Aug. 1, 1928). Contains survey notes on the oblique boundary. Authority was granted on July 24, 1928, for the closing of the public-land surveys on subsisting California-Nevada line as surveyed by the U.S. Coast & Geodetic Survey.

OO. Report of the Boundary Survey between California and Nevada by Butler Ives, 1863. Describes survey of the meridian line and the fact the survey of the oblique line was terminated about 102 miles and 46 chains due to weather stating: "This line cannot be considered absolutely correct, until it is continued to the Colorado River, and the error of intersection with the Initial Point there corrected back to Lake Bigler."

PP. Duplicate of California Exhibit 180.

QQ. Duplicate of California Exhibit 84.

RR. Duplicate of California Exhibit 86.

SS. Duplicate of California Exhibit 87.

TT. Duplicate of California Exhibit 88.

UU. E. BREWSTER, LIFE AND LETTERS OF JOSIAH DWIGHT WHITNEY (1909) at 202-205. Excerpt from a letter to William Dwight Whitney dated Sept. 6, 1861, indicates that he stopped at Lake Bigler to see Lieut. J. C. Ives who was determining the point of intersection of the 120th meridian with the 39th parallel.

VV. Letter from California Gov. Leland Stanford to Orion Clemens, Acting Governor Nevada Territory, Mar. 4, 1863. Letter introducing Judge Robinson as agent of California to confer on all matters relative to the boundary dispute arising out of the conflict at Honey Lake.

WW. Agreement resulting from the meeting of Judge Robert Robertson and Gov. Orion Clemens, Mar. 21, 1863.

1. Each governor to appoint a commissioner to run and permanently establish boundary lines.
2. For purpose of keeping peace, the boundary line running north from Lake Bigler shall be considered as temporarily established according to DeGroot's map and crossing the east end of Honey Lake.
3. Recommend to legislature of state and territory that rights acquired by parties along boundary line be enforced.
4. Gov. Clemens agrees to the foregoing conditions on the condition that the Gov. of California will recognize the line as run by John F. Kidder southeast from Lake Bigler as the temporary boundary until a permanent one established.

XX. Duplicate of California Exhibit 59.

YY. Duplicate of California Exhibit 71.

ZZ. Appointment and Contract of Butler Ives as Commissioner on behalf of Nevada by Orion Clemens, May 16, 1863. He is to act in conjunction with the surveyor general of California and be paid $3,000 in gold and silver coin.

AAA. Letter from Butler Ives to his brother, June 16, 1863. Indicates he had earlier offered to run the line between the states for $22,000 and has now been appointed commissioner by Nevada for the sum of $3,000.

AAA-1. Typed transcript of Nevada Exhibit AAA.

BBB. [1863] CAL. SURV. GEN. ANN. REP. 35-74. This is a report of the progress made in surveying the boundary line. It closely corresponds to the report made by Nevada Commissioner Butler Ives, which is Exhibit OO.

CCC. [1864] CAL. SURV. GEN. ANN. REP. 18-22. Indicates that by act of April 4, 1864 the survey of the eastern boundary of the state was discontinued. Includes description of the permanent monuments placed on the boundary line so far as marked.

DDD. Orion Clemens Report on the Boundary Line, addressed to the Speaker of the House of Representatives, Jan. 14, 1864. Report on the conference with Judge Robert Robinson and the fact he appointed Butler Ives to serve as Nevada's commissioner in the joint survey even though there was no law authorizing such survey or funds. Indicates that the survey was partially completed and shows the true location of the boundary line in the Honey Lake region.

EEE. Duplicate of California Exhibit 72.

FFF. Letter from L. Upson, U.S. Surveyor of California, to Nevada Territorial Governor James W. Nye, June 3, 1864. Indicates he has written California Gov. F. F. Low requesting a report of the joint survey between California and Nevada including a plat and field notes, and wants the same information from Nevada.

GGG. Act of Feb. 20, 1864, ch. 96, 1864 Nev. Terr. Stats. 139. An Act for the Relief of Butler Ives, Boundary Commissioner.

HHH. Duplicate of California Exhibit 73.

III. Certified copies of 57 state land patents issued by Nevada for territory between the Von Schmidt and Houghton-Ives line.

JJJ. 17 Stat. 10 (1871). Commissioner of the General Land Office is authorized to approve the survey of the eastern boundary of Nevada made by Isaac E. James.

KKK. H.R. EXEC. DOC. NO. 29, 42nd Cong., 3d Sess. (1872). Estimate of the appropriations necessary to supply deficiencies incurred in surveying for the years 1870, 1871, 1872, and 1873. Included is payment to Daniel Major for obliterating monuments on the eastern boundary of Nevada.

LLL. 17 Stat. 537 (1873). Appropriation of $200 for surveying the eastern boundary of Nevada.

MMM. H.R. EXEC. DOC. NO. [not supplied by Nevada], 42nd Cong., 2d Sess. (1871-72) at 51-55. Report of the Commissioner of General Land Office for 1871. This is a duplicate of California Exhibit 101, although a different reference source.

NNN. Duplicate of California Exhibit 96.

Appendix

OOO. Daniel Major's Astronomical Observations, Reductions and Field Notes of the Survey of the California and Oregon Boundary line, June 16, 1870. This is the complete text, pages 1-184; California Exhibit 97 contained excerpts of this document.

PPP. Letter from Willis Drummond to Daniel G. Major, Aug. 31, 1872. Drummond indicates that Major's application for surveying the eastern boundary of California and the northern boundary of Nevada have been received, and he is authorized to offer a contract for surveying the northern boundary of Nevada.

PPP-1. Special Instructions to Daniel G. Major for Survey of Northern Boundary of Nevada, Sept. 7, 1872.

PPP-2. Letter from Willis Drummond to Daniel G. Major, Sept. 12, 1872. Indicates Major's contract approved.

QQQ. H.R. EXEC. DOC. NO. 1, part 4, 41st Cong., 3d Sess. 33-34, 36 (1870). Details Major's work in establishing the boundary between California and Oregon. In the establishment of this boundary, five astronomical stations were determined, and a series of over 4,000 observations were made for the correct demarcation on the earth's surface of the 42nd parallel.

RRR. Photograph of Von Schmidt monument showing inscription "1873", taken by Mr. Bruce Greenhalgh.

RRR-1. Photograph of Von Schmidt monument similar to RRR.

RRR-2. Photograph of Von Schmidt monument similar to RRR.

RRR-3. Photograph of Von Schmidt monument similar to RRR.

SSS. NOT OFFERED IN EVIDENCE. The exhibit which was marked was a photograph.

TTT. H.R. EXEC. DOC., 42nd Cong., 2d Sess. (1871-72) at 48-51. Report of the Secretary of Interior. Indicates J. E. James contracted to survey the eastern boundary of Nevada. The initial point was fixed at the intersection of the 37th degree of longitude west from Washington with the center line of the Central Pacific Railroad.

UUU. 17 Stat. 350 (1872). Appropriation of $2,000 to enable the superintendent of the coast survey to make astronomical observations at one of the highest points on the line of the Pacific railroad.

VVV. Duplicate of California Exhibit 133.

WWW. A series of letters between A. W. Von Schmidt and Willis Drummond, with the exception of WWW-10 detailed below.

- WWW-1. Duplicate of California Exhibit 102.
- WWW-2. Duplicate of California Exhibit 103.
- WWW-3. Letter from Willis Drummond to A. W. Von Schmidt, Aug. 14, 1872. A personal determination of the longitude is required.
- WWW-4. Letter from Willis Drummond to A. W. Von Schmidt, Aug. 22, 1872. Von Schmidt will be loaned astronomical transit and zenith telescope as he requested from the War Dept.
- WWW-5. Duplicate of California Exhibit 108.
- WWW-6. Duplicate of California Exhibit 128.
- WWW-7. Duplicate of California Exhibit 129.

WWW-8. Letter from Willis Drummond to A. W. Von Schmidt Apr. 4, 1873. Refers Von Schmidt to his letter of March 22 for information in regard to the adjustment of his account.

WWW-9. Duplicate of California Exhibit 115.

WWW-10. Letter from W. W. Curtis, Acting Commissioner of General Land Office, to Senator A. A. Sargent, May 14, 1874. Von Schmidt has inquired as to whether he is entitled to any extra compensation for having run the first 100 miles of the eastern boundary of California twice, and marking and establishing the line each time by monuments. Curtis says that "the suggested extra compensation for service in fulfilling his contract, which was of no ordinary amount, has not, in the opinion of this office, any sound basis, under the terms of his contract."

XXX. Included in California Exhibit 105.

YYY. Nevada State Journal, Apr. 23, 1873. Reports the cast iron monument to designate the point where the states of California, Nevada and Oregon join was unloaded at the freight depot, and describes the monument in detail.

ZZZ. Duplicate of California Exhibit 105, including the pages offered by Nevada as XXX.

AAAA. Duplicate of California Exhibit 146, with additional page showing the back of envelope with handwritten computations on it.

BBBB. Letter from Willis Drummond to Senator A. A. Sargent, Apr. 15, 1874. Drummond's observations on Von Schmidt's desire to rerun the northern boundary of California, and the difference between the 120th meridian as found by Major and Von Schmidt. Indicates he does not understand the correspondence he has received which was written by Von Schmidt.

CCCC. Photograph of iron monument set by Von Schmidt north of Lake Tahoe.

CCCC-1. Photograph of iron monument in CCCC at a different angle.

DDDD. [1900] U.S. COAST & GEODETIC SURV. REP., app. 3 at 259-382. This is the complete appendix which is referred to as Sinclair's report. California Exhibit 64 contained relevant portions of this report.

EEEE, EEEE-1, 2, 4, 5, 6, 7, 8, 9, 13, 14 and 15. Listing by Nevada and clear listing by Secretary of Interior for townships 16, 17, 18, 19, 20 & 21, Range 18 East.

EEEE-3, 10, 11 and 12 were withdrawn as duplicates.

FFFF, FFFF-1, 2, 3, 4, and 5. Township plats for the above townships, records of Reno Bureau of Land Management Office.

GGGG. Map of the Boundary Line between Nevada Territory and California as surveyed in 1863. B. Ives, Commissioner for Nevada; Houghton, Surveyor General for California; Kidder, Engineer in Charge.

HHHH. Map of Boundary Line between Nevada, Oregon & Idaho surveyed and established by Daniel G. Major, 1873, and certified by Willis Drummond, Dec. 9, 1873.

Appendix

IIII. Diagram showing the discrepancy between the position of the 120th meridian west of Greenwich as determined by Daniel Major in August 1868 and California State line as surveyed in 1863 by Houghton-Ives, prepared by L. Boss, circa 1868.

JJJJ. Map of the Eastern Boundary of the State of California showing the 120th Degree of Longitude West of Greenwich lying between the 42nd and 39th Degrees of North Latitude as surveyed by Allexey Von Schmidt under contract dated July 20, 1872 with Willis Drummond. Certified by Drummond.

KKKK. Two maps which comprise all of the oblique line boundary between California and Nevada from the intersection of the 120th degree of longitude West of Greenwich with the 39th degree north latitude to the intersection of the 35th degree north latitude with the center of the channel of the Colorado River as surveyed by Von Schmidt. Each are certified by Drummond as conforming with his field notes.

LLLL. U.S. Coast and Geodetic Survey map of Oblique boundary between California and Nevada, 1893-99.

LLLL-1. Map of the Oblique Boundary Between California and Nevada showing arrangement of Topographic Sheets, the Random Line, Von Schmidt Line, Scheme of Triangulation and Profile based on 1893-99 U.S.C. & G.S.

MMMM. Two diagrams showing (1) points of the oblique boundary between California and Nevada established by Von Schmidt near intersection of 35° latitude with the Colorado River and located by the Coast and Geodetic Survey; and points of Oblique Boundary line established and located by the Coast and Geodetic Survey; and (2) Points of Oblique Boundary line between California and Nevada, near Lake Tahoe, established by Von Schmidt and located by the Coast and Geodetic Survey, and Points of Oblique Boundary line established and located by the Coast and Geodetic Survey.

NNNN. Quadrangle map of U.S. Geographical Survey, issued June 30, 1882, resulting from expeditions of 1877 and 1878.

OOOO. Photograph taken from U-2 plane of Lake Tahoe area on which the approximate lines of Major, Houghton-Ives, Von Schmidt and the 1893-99 U.S. Coast and Geodetic Survey have been placed.

PPPP. Landrum, *A Major Monument: Oregon-California Boundary*, 72 ORE. HISTORICAL QUARTERLY 5-53 (1971). Indicates that the Houghton-Ives survey was the first to attempt to locate precisely the northeast corner of California. Indicates that Major probably surveyed more miles of state boundaries than any other one man, and lists the various boundaries he surveyed. Ultimately concludes that: "The present appraisal of Major's line, a century later, shows that he ran a mediocre to average survey, considering the conditions under which he worked, and further considering that his line was 'open-end'—that is, it did not return upon itself to suppy a means of checking. However, others have done much better."

QQQQ. NOT OFFERED IN EVIDENCE. A diagram prepared by and under the direction of Francis Landrum.

RRRR. Photograph of Major's monument taken by Francis Landrum 7-26-69 showing sandstone block marked "Nevada."

SSSS. Photograph of Major's Monument taken by Landrum.

TTTT. California State Geological Survey Topographical Map of Central California together with a Part of Nevada, J. D. Whitney, Geologist, C. F. Hoffmann, Topographer, 1873. Reduced photocopy of left half of map.

UUUU. Same as TTTT, Sheets II, III, IV covering bottom half and upper right corner of map.

VVVV. Britton § Rey's Map of State of California compiled from the U. S. Land & Coast Surveys, the several Military, Scientific & Rail Road Explorations, the state County Boundary Surveys made under the Order of the Surveyor General of California, & from Private Surveys, George H. Goddard, 1857.

WWWW. Map by Dept. of Interior, U.S. Geological Survey, Edition of July 1895, Surveyed in 1889, from 120°30′ to 120°00′ and 39°, designated "California Truckee Sheet."

XXXX. Same as Exhibit WWWW except edition of November 1891.

YYYY. Map of State of California, Dept. of the Interior, General Land Office, 1879.

ZZZZ. Map of the Public Surveys in the State of Nevada, U.S. Surveyor General's Office, Virginia City, Nevada, Sept. 22, 1871.

AAAAA. Map of the Public Surveys in Nevada, U.S. Surveyor General's Office, Virginia City Nevada, June 30, 1870.

BBBBB. National Map of the Territory of the United States from the Mississippi River to the Pacific Ocean, Office of the Indian Bureau, 1867.

CCCCC. Essayons Topographical Map of California, Nevada, Oregon, and part of Idaho, prepared from Field Surveys and other Reliable Data Under the direction of Bvt. Lt. Col. R. S. Williamson, Corps of Engineers, 1867.

DDDDD. Map of the State of Nevada, compiled under the direction of J. D. Whitney for U. S. Engineer Dept., 1867.

EEEEE. Map of the State of Nevada, Warren Holt, publisher, 1866.

FFFFF. Map of Nevada, U. S. Engineer's Office, San Francisco, California, circa 1865.

GGGGG. DeGroot's Map of Nevada Territory, Exhibiting a Portion of Southern Oregon and Eastern California, Warren Holt, publisher, 1863.

HHHHH, HHHHH-1 through 68. Copies of 69 land patents issued by Nevada along the oblique boundary.

IIIII. Schedule identifying the patents in HHHHH by date, number of acres patented, name of patentee, legal description, etc.

JJJJJ. S. EXEC. DOC. [no number supplied by Nevada], 37th Cong., 2d Sess. 490-91, 493-94 (1861-62). Indicates in report by Secretary of Interior on the eastern boundary of California that $55,000 was appropriated for a survey, $37,551.19 was squandered and additional liabilities of $4,416.21 were incurred and that the survey was temporarily suspended. This is the survey which had been undertaken by Mowry.

KKKKK. H.R. EXEC. DOC. [no further number supplied by Nevada] 39th Cong., 1st Sess. 13-15 (1865-66). Indicates contracts awarded for surveys in California and Nevada, that California has refused to cede any territory to the State of Nevada, and no further steps have been taken in the survey of the eastern boundary of California.

LLLLL. Sworn statement of Francis S. Landrum, Mar. 29, 1979. Remarks concerning the substance of the 1978 National Geodetic Survey report on boundary monuments near Lake Tahoe.

MMMMM. Nevada Assembly Bill 627, 1979 Nev. stats. ch. 214—An Act repealing NEV. REV. STAT. § 234.010 relating to the state's boundaries.

Nevada also offered in evidence, from Defendant's Answer to Plaintiff's Second Set of Interrogatories, Filing # 8, the answer to question 4(d) which was received.

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1981

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior United States
District Judge
Lincoln, Nebraska
Special Master

JOE CHRISTENSEN, INC., 1540 Adams Strert, Lincoln, Nebraska 68521

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In the

Supreme Court of the United States

October Term, 1981

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior United States
District Judge
Lincoln, Nebraska
Special Master

This case involving the boundary between the States of California and Nevada was previously before this Court on the report of your Special Master filed October 29, 1979. On the 10th day of June, 1980, the Court, by unanimous decision, affirmed the report of the Special Master. *California v. Nevada*, 447 U.S. 125 (1980). In a footnote, the Court discussed the procedure for the marking of the boundary and stated in part:

> "Several subsidiary issues relating to the California-Nevada border are considered in the Special Master's recommendations. First, it turns out that Von Schmidt's north-south line and the United States Coast and Geodetic Survey oblique line do not intersect at precisely the 39th parallel, as in theory they should. The Special Master suggests that the two States be given the opportunity to determine by agreement the point in Lake Tahoe where the two lines meet. Failing such an accord, he indicates that he would recommend a solution; but this probably will not be necessary since the parties are apparently in agreement that if the balance of the Master's report is accepted the best course is to extend the oblique line in a northwesterly direction to the point where it crosses the north-south line. This solution to the problem is entirely permissible. Cf. *New Hampshire v. Maine*, 426 U.S. 363 (1976). Second, the Master recommends that he be authorized to arrange for surveys, at the parties' expense, if necessary to resolve disputes over the precise location of portions of either of the lines we approve today. That, too, seems appropriate."

Id. at 132 n.9.

Counsel, with the assistance of surveying and engineering experts for the States and the National Geodetic Survey, have reached an agreement, dated February 5, 1982, called Stipulation. The Stipulation sets out the location and marking of the entire boundary between the two states. A copy of this Stipulation, marked Appendix 1, is attached hereto as a part of this report. A proposed Decree was also tendered to your Special

Master, a copy of which is marked Appendix 2 and attached hereto. The original signed Stipulation and the proposed Decree are being submitted separately to the Clerk for filing. The original documents contain a map designated Exhibit A showing the agreed upon intersection in Lake Tahoe of the Von Schmidt north-south line and the United States Coast and Geodetic Survey oblique line. In order to include Exhibit A in this report, it has been reduced in size exactly 50% from the original. Thus, the scale as shown upon the reduced copy in the appendix is inaccurate. The 50% reduction would also allow the map to be printed as a part of the Decree in the Official Reports of the Supreme Court.

Your Special Master has discussed this reduction in size with counsel, who have conferred with their respective experts, and have agreed, and so advised me, that the reduction of Exhibit A has no effect on the information it contains except for the scale. The parties are agreed, and your Special Master concurs, that the simplest way to eliminate this problem is to remove the scale from the map, as was done with Appendix 3, attached hereto. Appendix 3 could then be substituted for Exhibit A in this Court's printed version of the Decree, providing it is acceptable to the Court. The parties do believe that the map is necessary for the benefit of future surveyors and for the information of the public in each State. Even in its reduced size, the map is legible and will serve the purpose of the parties.

In order to make the Stipulation and this Court's Decree available to interested persons, the Attorneys General of the two States, by David B. Judson and Larry D. Struve, have agreed that a certified copy of each shall be filed in appropriate offices in the States of California and Nevada. In Nevada these documents will be filed with the State Lands Registrar, Room 120, 201 South Fall Street, Carson City 89701. California will file

them in the State Archives, 1020 O Street, Sacramento 95814. The California State Lands Commission will also maintain copies at its office at 1807 13th Street, Sacramento 95814. They have also agreed that copies of these documents should be offered to the National Archives or the Library of Congress, whichever institution, if either, will accept them.

Considerable work has been done by the National Geodetic Survey, a sub-division of The National Oceanic and Atmospheric Administration, on the surveys agreed upon by the parties. Counsel and your Special Master recognize the work that has been done, without charge to the parties, and believe that the solution to this long-standing controversy between the two sovereign States would have been delayed for a much longer time without such help and assistance.

Counsel proposed and your Special Master agrees that this report should contain the following recognition:

> "As part of their agreement to determine the point in Lake Tahoe where the north-south and oblique lines intersect, the states requested the National Geodetic Survey of the National Oceanic and Atmospheric Administration to locate and monument certain points around the periphery of the lake from which this point of intersection as well as the positions of the boundary lines within the lake could be calculated. The National Geodetic Survey consented and undertook the task at its own expense. Both states have expressed their satisfaction for the meticulous and technically precise job done by the Survey and their appreciation for the very professional, courteous and expeditious manner in which that staff performed the job. The Assistance offered by the National Geodetic Survey was instrumental in the final resolution of this controversy."

Your Special Master recommends that the Court accept the parties Stipulation and enter the Decree sub-

mitted herein, but that the 50% reduced map, Appendix 3, be substituted in the Decree of this Court for Exhibit A, attached to the original Stipulation. Your Special Master further recommends that no costs be taxed for the services of your Special Master herein, that upon the order of termination of this case your Special Master file a report setting forth the amount of money received by him from the parties for the payment of costs and expenses pursuant to his requests and of its disbursement for approval by the Court unless prior thereto the parties in writing have approved your Special Master's report as to the disbursement of said moneys.

Respectfully submitted,

ROBERT VAN PELT,
Special Master
Senior U.S. District Judge
566 Federal Building
100 Centennial Mall North
Lincoln, Nebraska 68508

DATED: April 27, 1982.

Appendix 1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981
No. 73, Original

STATE OF CALIFORNIA,	)
	)
Plaintiff,	)
	)
v.	)
	)
STATE OF NEVADA,	)
	)
Defendant.	)
	)

STIPULATION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981
No. 73, Original

STATE OF CALIFORNIA,)
)
Plaintiff,)
)
v.)
)
STATE OF NEVADA,)
)
Defendant.)
)

STIPULATION

It is hereby stipulated by and between the State of California, Plaintiff, and the State of Nevada, Defendant, by and through their respective counsel whose signatures are affixed below, that:

1. On June 10, 1980, the United States Supreme Court approved the Special Master's recommendation that the boundary between the States of California and Nevada be determined and established to be the line known as the Von Schmidt line from its initial monument at the intersection of the 42nd parallel of north latitude on the Oregon border and the 120th degree of longitude west from Greenwich, each as reported by Allexey W. Von Schmidt in 1872 and extending south as marked and determined by Von Schmidt to the point in Lake Tahoe on or near the 39th parallel of north latitude where such north and south line intersects a straight line known as the United States Coast and Geodetic Survey line as established by it from 1893-1899 and continuing from such point of intersection along

said straight line running in a southeasterly direction to the point where the 35th parallel of north latitude intersects the Colorado River as determined by compacts between Arizona-Nevada and California-Arizona. The Court decision is more fully set forth in 447 U.S. 125.

2. The Court recognized that the Von Schmidt north and south line and the United States Coast and Geodetic Survey oblique line do not intersect at precisely the 39th parallel of north latitude.

3. The Court approved the Special Master's recommendation that the two states be given the opportunity to determine by agreement the point in Lake Tahoe where the north and south line ends and the oblique line begins and how it shall be marked, if at all, subject to the approval of the Court.

4. The states have agreed on a method by which to locate the point of intersection of these lines in Lake Tahoe and have requested the National Geodetic Survey of the National Oceanic and Atmospheric Administration within the Department of Commerce to perform the field work necessary to locate and monument reference points for this purpose around Lake Tahoe.

5. Pursuant to this request the National Geodetic Survey has completed an official project entitled California-Nevada Boundary Resurvey, Lake Tahoe (Task No. 83621115; G16758) in which the desired reference monuments have been established according to the authorized standards and regulations of that agency.

6. The National Geodetic Survey has provided the states with the official results of the project which contain the adjusted coordinates for the reference monuments. The states have agreed that the method used to established the point of intersection in Lake Tahoe of the aforesaid lines by means of these reference monu-

ments is the best method available to establish the true boundary between the states falling within Lake Tahoe.

7. The states have further agreed that a copy of the project report, computations and any other pertinent records made available to either state by the National Geodetic Survey relative to the monumentation of the reference points hereinafter described shall be filed as public records in an appropriate state agency in each state whose interest may be affected by the lake boundary and angle point described herein.

8. The states have further agreed to strengthen the rock pile containing the marker placed in 1872 by Allexey W. Von Schmidt at the place as determined by him to be the beginning of the aforementioned north-south line at or near the intersection of the 42nd parallel of north latitude along the southern boundary of the State of Oregon and the 120th degree of longitude west from Greenwich which is referred to as the Initial Point on the California-Nevada boundary in the proposed description hereinafter set forth, said strengthening to occur at a time and in a manner to be mutually agreed upon between the two states, so that said marker becomes a more secure permanent monument on the California-Nevada boundary.

NOW, THEREFORE, THE PARTIES AGREE that the boundary between the States of California and Nevada should be described in the decree of this Court as follows:

Beginning at the Initial Point on the California-Nevada boundary as established under authority of the Act of June 10, 1872, 17 Stat. 358, by Allexey W. Von Schmidt in 1872 as an eight (8) inch square wood post set in a large mound of stone at the intersection of the 42nd parallel of north latitude along the southern boundary of the State of Oregon and the 120th degree

of longitude west from Greenwich, each as reported by him; thence running southerly along said 1872 boundary as surveyed and marked by Allexey W. Von Schmidt to a cast iron monument designated as Von Schmidt Milepost 191 on said boundary; thence S 00° 09′ 15.″21 W along a line directed toward a standard National Geodetic Survey brass marker cemented in a granite formation and stamped "VS 120, 1981," located at the geographic position of: Latitude 38° 53′ 51.″59866 Longitude 120° 00′ 20.″93116, a distance of 80,191.63 feet to an intersection in Lake Tahoe with a line extending between two points, the first of which is a standard National Geodetic Survey brass marker cemented in granite and stamped "EAGLE ROCK, 1981," which has a geographic position of: Latitude 39° 06′ 33.″17268, Longitude 120° 09′ 38.″06504, and the second being a granite stone with copper bolt identified as No. 1 (Initial 1894), being the first monumented point on the California-Nevada Oblique 1893-99 Boundary survey as determined and marked by the U.S. Coast and Geodetic survey; thence from said intersection point in Lake Tahoe S 48° 46′ 02.″80 E, 21,568.48 feet to said Monument No. 1 (Initial 1894); thence proceeding southeasterly along the oblique California-Nevada boundary line as surveyed and marked by the U.S. Coast and Geodetic Survey, under authority of the Act of August 5, 1892, 27 Stat. 357, during the period 1893-1899, to Point No. 1 described in the Interstate Compact Defining the Boundary Between the States of Arizona and California, executed on March 12, 1963, being a point common to Point No. 1 described in the Interstate Compact Defining A Portion of the Arizona-Nevada Boundary On The Colorado River, executed February 6, 1960. Bearings, distances, and geographic positions used hereinbefore are based upon the 1927 North American Datum and are denoted on

the attached map, Exhibit A, which is incorporated herein by reference.

The intersection of the two lines described herein shall form the only angle point of the true California-Nevada state boundary within the waters of Lake Tahoe, which angle point shall be considered as satisfying the definition of the intersection of the 120th meridian west of Greenwich with the 39th parallel of north latitude as prescribed in the constitutions of California and Nevada.

THE PARTIES FURTHER AGREE that the decree of this Court should include directions pertaining to the allocation of the expenses of this action, as follows:

1. That the necessary expenses incurred by the Special Master incident to this litigation and all other proper expenses incurred jointly by the parties shall be equally borne by the parties.

2. That, except as provided in the aforesaid paragraph, each party shall bear its own expenses.

3. That any unexpended funds contributed by the parties to the Special Master for necessary expenses be returned to the parties in proportion to their contributions.

DATED: February 5, 1982

GEORGE DEUKMEJIAN, Attorney General
of the State of California
N. GREGORY TAYLOR,
Assistant Attorney General
JAN S. STEVENS,
DAVID B. JUDSON,
Deputy Attorneys General

By David B. Judson
DAVID B. JUDSON,
Deputy Attorney General
Counsel for Plaintiff,
State of California

DATED: February 5, 1982

RICHARD H. BRYAN, Attorney General
of the State of Nevada
LARRY D. STRUVE,
Chief Deputy Attorney General
HARRY W. SWAINSTON,
Deputy Attorney General

By Larry D. Struve
LARRY D. STRUVE,
Chief Deputy Attorney General
Counsel for Defendant,
State of Nevada

TO OREGON
STATE OF CALIFORNIA
STATE OF NEVADA
L A K E
T A H O E
Von Schmidt Iron Mon
Monument 191 1872
Lat. 39° 13' 24" 82
Long. 120° 00' 16" 09
NGS
EAGLE ROCK 1981
Brass cap in rock
Lat. 39° 06' 33" 172
Long. 120° 09' 38" 6504
S 48° 51' 54" 46 E
Azimuth 315° 08' 09" 34
Azimuth 135° 08' 57" 20
56 534.44 ft
S 00° 09' 15" 21 W
Azimuth 000° 09' 15" 2"
Azimuth 180° 09' 13" 49
80 191.63 ft
NORTH
LOCATION OF
CALIFORNIA-NEVADA
BOUNDARY
Vicinity of Lake Tahoe
SCALE: 1 in. = 2.5 Mi.
NOTE: Bearings, distances and geodetic positions shown hereon are based upon the 1927 North American Datum. Azimuths are measured clockwise from the south, and are each referenced to the meridian of the stations from which they emanate.
1 Meter = 39.37 in.
ANGLE POINT
not marked
Lat. 39° 00' 12" 205
Long. 120° 00' 19" 624
N 00° 00' 12" 67 E
Azimuth 180° 09' 13" 49
Azimuth 000° 09' 13" 49
58 509.20 ft
USC & GS Stone Mon
No 1 (Initial) 1894
Lat. 38° 57' 51" 638
Long. 119° 56' 54" 272
TO COLORADO RIVER
NGS VS 120 1381
Brass cap in rock
Lat. 38° 53' 51" 59866
Long. 120° 00' 20" 93116

Exhibit A

Appendix 2

SUPREME COURT OF THE UNITED STATES
STATE OF CALIFORNIA v. STATE OF NEVADA
ON BILL OF COMPLAINT
No. 73, Original Decided June 10, 1980
DECREE

For the purpose of giving effect to the opinion of this Court announced on June 10, 1980, 447 U.S. 125, and the stipulation of the parties entered into on February 5, 1982, and approved by the Special Master:
IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the location of the boundary between the States of California and Nevada is as hereafter specified:

Beginning at the Initial Point on the California-Nevada boundary as established under authority of the Act of June 10, 1872, 17 Stat. 358, by Allexey W. Von Schmidt in 1872 as an eight (8) inch square wood post set in a large mound of stone at the intersection of the 42nd parallel of north latitude along the southern boundary of the State of Oregon and the 120th degree of longitude west from Greenwich, each as reported by him; thence running southerly along said 1872 boundary as surveyed and marked by Allexey W. Von Schmidt to a cast iron monument designated as Von Schmidt Milepost 191 on said boundary; thence S 00° 09′ 15.″21 W along a line directed toward a standard National Geodetic Survey brass marker cemented in a granite formation and stamped "VS 120, 1981," located at the geographic position of: Latitude 38° 53′ 51.″59866 Longitude 120° 00′ 20.″93116, a distance of 80,191.63 feet to an intersection in Lake Tahoe with a line extending between two points, the first of which is a

standard National Geodetic Survey brass marker cemented in granite and stamped "EAGLE ROCK, 1981," which has a geographic position of: Latitude 39° 06′ 33.″17268, Longitude 120° 09′ 38.″06504, and the second being a granite stone with copper bolt identified as No. 1 (Initial 1894), being the first monumented point on the California-Nevada Oblique 1893-1899 Boundary survey as determined and marked by the U.S. Coast and Geodetic Survey; thence from said intersection point in Lake Tahoe S 48° 46′ 02.″80 E, 21,568.48 feet to said Monument No. 1 (Initial 1894); thence proceeding southeasterly along the oblique California-Nevada boundary line as surveyed and marked by the U.S. Coast and Geodetic Survey under authority of the Act of August 5, 1892, 27 Stat. 357, during the period 1893-1899, to Point No. 1 described in the Interstate Compact Defining the Boundary Between the States of Arizona and California executed on March 12, 1963, being a point common to Point No. 1 described in the Interstate Compact Defining A Portion of the Arizona-Nevada Boundary On The Colorado River, executed February 6, 1960. Bearings, distances, and geographic positions used hereinbefore are based upon the 1972 North American Datum and are denoted on the attached map, Exhibit A, which is incorporated herein by reference.

2. That the intersection of the two lines described herein shall form the only angle point of the true California-Nevada state boundary within the waters of Lake Tahoe, which angle point shall be considered as satisfying the definition of the intersection of the 120th meridian west of Greenwich with the 39th parallel of north latitude as prescribed in the constitutions of California and Nevada.

3. That the necessary expenses incurred by the Special Master incident to this litigation and all other

proper expenses incurred jointly by the parties shall be equally borne by the parties.

4. That, except as provided in paragraph 3 herein, each party shall bear its own expenses.

5. That any unexpended funds contributed by the parties to the Special Master for necessary expenses be returned to the parties in proportion to their contributions.

DATED: _____

Supreme Court of the United States

_____

TO OREGON
STATE OF CALIFORNIA
STATE OF NEVADA
L A K E
T A H O E
Von Schmidt Iron Mon
Milepost 191 1872
Lat 39° 13' 24".82
Long 120° 00' 16".89
NGS
EAGLE ROCK 1981
Brass cap in rock
Lat 38° 06' 33".17206
Long 120° 09' 38".05504
S 48° 51' 14".98 E
Azimuth 310° 08' 05".34
Azimuth 130° 13' 57".20
58,534.24 ft
S. 00° 09' 15".21 W.
Azimuth 180° 09' 13".49
80,191.63 ft
NORTH
LOCATION OF
CALIFORNIA-NEVADA
BOUNDARY
Vicinity of Lake Tahoe
ANGLE POINT
not marked
Lat 39° 00' 12".205
Long 120° 00' 19".624
S. 48° 48' 02".60 E.
Azimuth 310° 13' 57".20
21,648.48 ft
SCALE: 1 in. = 2.5 Mi.
NOTE Bearings distances and
geodetic positions shown hereon
are based upon the 1927
North American Datum Azimuths
are measured clockwise from
the south and are each referenced
to the meridian of the stations
from which they emnate
1 Meter = 39.37 in.
N. 00° 09' 15".67 E.
Azimuth 180° 09' 13".49
18,326.20 ft
USC & GS Stone Mon
No 1 Initial 1894
Lat 38° 57' 51".638
Long 119° 56' 54".272
NGS VS 120 1981
Brass cap in rock
Lat 38° 53' 51".59866
Long 120° 00' 20".93116
TO COLORADO RIVER

Exhibit A

Appendix 3

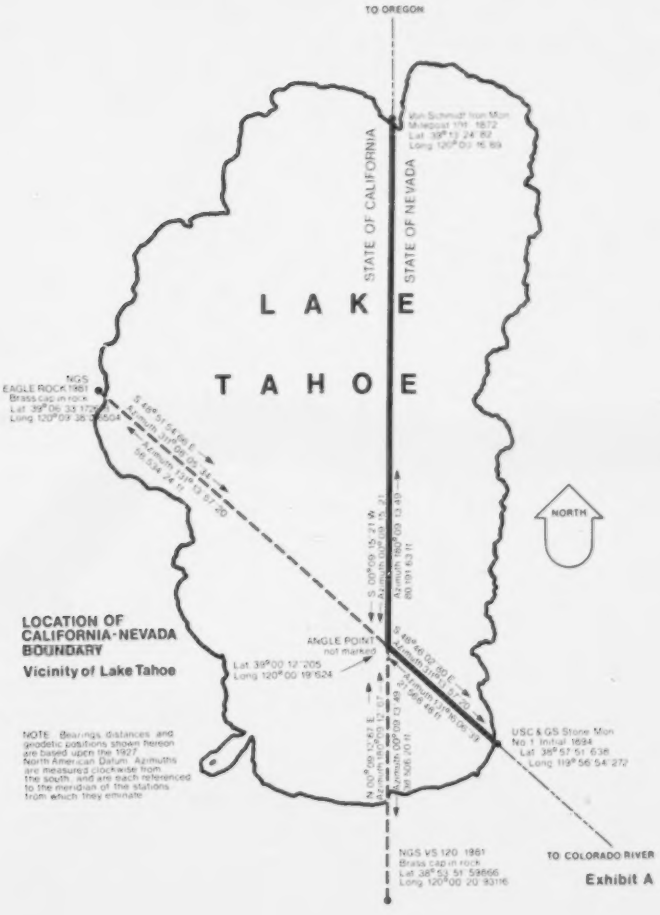

Exhibit A

Supreme Court, U. S.
FILED
DEC 11 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 73, Original

STATE OF CALIFORNIA
Plaintiff,
v.
STATE OF NEVADA
Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF SPECIAL MASTER'S REPORT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 73, Original

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF NEVADA,
Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF SPECIAL MASTER'S REPORT

JURISDICTIONAL STATEMENT

This case is an original action in which the Court has jurisdiction under Article III, Section 2, Clause 2 of the Constitution and 28 United States Code, section 1251.

STATEMENT OF THE CASE

At issue in this case is the proper placement of the boundary between California and Nevada—a line beginning at the Oregon border and extending south through rocky mountains and juniper and sagebrush covered valleys to Lake Tahoe where, at its intersection with the 39th parallel, it makes an oblique angle and continues southeasterly in a straight line to the intersection of the 35th parallel and the Colorado River. Its approximate

location is depicted in exhibit A to California's original complaint in this action, a copy of which is attached as exhibit A to this pleading.

The discovery of apparent inaccuracies in that part of the line extending from the Oregon border to the 39th parallel in Lake Tahoe, described in this proceeding as the "north-south" line, (e.g., exhs. 12, 165, 169, 172) led to the filing of a complaint by the State of California. It requested this Court to declare that the line as surveyed in 1872 by A. W. Von Schmidt pursuant to contract with the General Land Office be declared to be the lawful boundary between California and Nevada from the Oregon border to the 39th parallel at Lake Tahoe, on the basis of its recognition in fact by both states and the federal government since its initial placement.

An amicus brief was subsequently filed by then California Assemblyman Mike Cullen urging that a new survey of the north-south boundary be ordered to achieve an astronomically accurate placement using modern and more precise methods.

Concurrently, Nevada was granted permission to file an amended answer and counterclaim raising several alternative lines and putting into issue the location of the remainder of its boundary with California—the so-called "oblique" boundary commencing at the 39th parallel and extending southeasterly to the intersection of the 35th parallel with the Colorado River. Nevada urged a number of alternative claims:

1. Adoption of the earlier, 1863 Houghton-Ives line as the lawful boundary to the extent it was surveyed from

Oregon to a point approximately 102 miles south of Lake Tahoe, and its continuation by new survey to the Colorado River;

2. Establishment of a new line by surveying due south from a point identified by Daniel G. Major in 1868, as the intersection of the 42nd parallel with the 120th meridian, and then proceeding southeasterly from the 39th parallel to the intersection of the 35th parallel and the Colorado River;

3. Establishment of the entire Von Schmidt line from the Oregon border to the Colorado River as the lawful boundary;

4. Adoption of the 43rd meridian west from Washington rather than the 120th meridian west of Greenwich from the Oregon border to the 39th parallel, and extension from the intersection of this line with the 39th parallel southeasterly to the intersection of the 35th parallel with the Colorado River; and

5. If, and only if, all of the above alternatives prove unacceptable, confirmation of the line presently recognized on the ground as the legal boundary (i.e., the Von Schmidt line as the north-south boundary, and a line established by the United States Geodetic Survey in 1893–1899 as the oblique boundary).

Exhibits B and C hereto represent approximate locations of these lines with respect to the north-south and oblique boundaries.

California then filed its Reply and Amended Complaint denying Nevada's newly-asserted claims and urging that in the event the court should reject the Von

Schmidt line as the north-south boundary, and the Coast and Geological Geodetic Survey line as the oblique boundary, new surveys be ordered.

Concurrently, California filed a motion requesting permission to file an amended complaint joining the United States as a party for the purpose of clarifying the ownership of several thousands of acres of lands affected by the boundary controversy. It was proposed in California's motion that the proper location of the interstate boundary be first determined, and that the court then retain jurisdiction for subsequent consideration of the effect of such determination on titles along the border. A similar concern with titles was expressed by amicus California Land Title Association, which filed a brief suggesting possible solutions.

The Special Master then filed his report, summarizing the voluminous body of evidence received at the hearings on the matter and recommending, in substance, that:

1. The boundary between the states be determined and established as the Von Schmidt line from the Oregon border to the 39th parallel, and the United States Coast and Geodetic Survey line along the oblique boundary to the intersection of the 35th parallel with the Colorado River as determined by compacts between Arizona-Nevada and California-Arizona;

2. The states be given the opportunity to determine by agreement the proper intersection of the north-south and oblique lines in Lake Tahoe. In the absence of such agreement, the Special Master should be empowered to

hold further hearings and make recommendations with respect to such placement;

3. The Special Master should be empowered to arrange for a survey in the event parties are unable to agree upon the marking of either of the Von Schmidt or United States Coast and Geodetic Survey lines on the ground;

4. California's motion for leave to file a second amended complaint and bifurcate issues with respect to ownership of disputed lands on the California-Nevada boundary should be allowed; and

5. The Special Master should be authorized to confer with the parties and the United States Solicitor General's Office with respect to questions raised by California's motion concerning possible interests of the United States in this proceeding and to make recommendations "for such other and further relief as the Court may deem proper including recommendation as to the quieting of title to any lands, if needed."

California supports the recommendations of the Special Master and respectfully urges their adoption by this Court.

STATEMENT OF THE FACTS

Alta California, newly acquired from Mexico in 1848, was a vast and sparsely settled expanse of land covering what are now the states of California, Nevada, Utah, most of Arizona, and parts of New Mexico, Colorado, and Wyoming—an estimated 448,691 miles. Exh. 70; Goodwin, The Question of the Eastern Boundary of California

in the Convention of 1849, 16 Southwestern Historical Quarterly 227, 230 (Jan. 1913). It did not remain so long. With the discovery of gold in the same year, pressures developed that led inexorably to statehood in 1850. California was never a territory of the United States. Enriched by the revenues from vast gold deposits and populated by a huge influx of fortune hunters, it became a state virtually overnight.

A. California's boundaries were defined *definitively in its Constitution of 1849*

In the Compromise of 1850, Congress admitted a state bounded on the north by Oregon and the 42nd parallel, on the east by the 120th meridian and an oblique line extending from Lake Tahoe to the Colorado River, and on the south by Mexico. These are the boundaries given the new State of California; boundaries that Congress would be powerless to change without California's consent. E.g., *Washington* v. *Oregon* (1908) 211 U.S. 127, 131; *Louisiana* v. *Mississippi* (1905) 202 U.S. 1, 40.

The description of these boundaries appears in California's Constitution of 1849 which was approved by Congress on September 9, 1850. Act of Sept. 9, 1850, ch. 50, 9 stat. 452, exh. 6. It describes her eastern boundary as:

> ". . . Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred-twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred-twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a southeasterly direction to the River Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and Mexico, as established by the treaty of May thirtieth, one thousand eight hundred forty eight; . . . ." Cal. Const. of 1849, art. XII (1853), Cal. Comp. Laws at 584; exh. 5.

On the same date that California was admitted to the

Union, Congress created the territory of Utah. The organic act defined the new territory's boundaries in relevant part as follows:

> "That all that part of the territory of the United States included within the following limits, to wit: *bounded on the west by the State of California*, on the north by the territory of Oregon, and on the east by the summit of the Rocky Mountains, and on the south by the thirty-seventh parallel of north latitude, be, and the same is hereby, created into a temporary government, by the name of the Territory of Utah; . . ." Act of Sept. 9, 1850, ch. 51, 9 Stat. 453; exh. 13, emphasis added.

In 1861, the Territory of Nevada was created out of Utah. The organic act defined its boundaries as follows:

> "[B]eginning at the point of intersection of the forty-second degree of north latitude with the thirty-ninth degree of longitude west from Washington; thence, running south on the line of said thirty-ninth degree of west longitude, until it intersects the northern boundary line of the Territory of New Mexico; *thence due west to the dividing ridge separating the waters of Carson Valley from those that flow into the Pacific; thence on said dividing ridge northwardly to the forty first degree of north latitude*; thence due north to the southern boundary line of the State of Oregon; thence due east to the place of beginning . . . *'Provided,' That so much of the territory within the present limits of the State of California shall not be included within this Territory until the State of California shall assent to the same by an act irrevocable without the consent of the United States*: . . ." Act of Mar. 2, 1861, ch. 83, 12 Stat. 209; exh. 14; emphasis added.

A number of efforts to include part of California in the new Territory of Nevada were made. In 1861, the Nevada territorial government sent a commission to the State of California for the purpose of obtaining the cession of the part of California east of the crest of the Sierra Nevadas. Exhs. 28, 29. Nevada renewed its appeal to California and the United States Congress for the Sierra Nevada crest boundary in 1862. Exhs. 15, 31, 43, 44. Congress responded by adding a degree of longitude to Nevada's eastern boundary. Exhs. 15, 16, *supra*, 22.

The Legislature of California refused to cede the territory. It was believed that such act would require a constitutional amendment enacted by popular vote and that such amendment would be extremely difficult to accomplish. Exhs. 30, 43.

Nevada became a state and was admitted to the Union by Act of Congress and subsequent Presidential Proclamation on October 31, 1864. Exhs. 18, 20. The act and proclamation approved the Nevada Constitution, which provided in part:

> "The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty-eighth degree of Longitude west from Washington with the thirty-seventh degree of north latitude; thence due West along said thirty seventh degree of north latitude *to the eastern boundary line of the State of California; thence in a northwesterly direction along said eastern boundary line of the State of California to the forty-third degree of longitude west from Washington; thence*

north along said forty-third degree of west longitude, and said eastern boundary line of the State of California to the forty-second degree of north latitude; . . . *'And furthermore Provided,' that all such territory, lying west of and adjoining the boundary line herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this state.*" Nev. Const. art XIV, § 1; exh. 19; emphasis added.

As previously indicated, a number of efforts were made to include parts of eastern California within the Territory of Nevada. By conditionally extending Nevada's boundary to the crest of the Sierras subject to California's approval (exhs. 14, 19), Congress had shown its recognition of the established doctrine that it was powerless to take territory from a state without its consent. Nevertheless, the Nevada Territorial Legislature proceeded to act as if the boundary had been changed by creating a new county, actually located in California, within a restless border valley. Nev. Stat. 1861, ch. 6, pp. 37–39.

The confusion that ensued led to a full-fledged battle. The Honey Lake Valley, a fertile basin north of Lake Tahoe and approximately 10 miles west of the presently marked boundary, was settled by Peter Lassen and Isaac Roop in 1853. Isolated from California by heavy snows four months a year, its residents were independent from the start. In 1856, 20 of them met and passed a resolution declaring "[i]nasmuch as Honey Lake Valley is not within the limits of California, the same is hereby declared

a new territory . . . to be named Nataqua." Nataqua was Paiute for "woman." The settlers claimed a total of 37,000 square miles of territory, including seven Nevada counties and western parts of three more. Their eastern boundary was to be the 118th meridian, and the California line their western line. Aiken, The Sagebrush War, the California-Nevada Boundary Dispute on the 120th Meridian, unpublished thesis, Univ. of Oklahoma (1971); Mack, Nevada, 399–403 (Clark ed. 1936); Hinkle, Sierra-Nevada Lakes, 110–152 (Bobbs-Merrill); exh. PPPP.

California's Plumas County, claiming the Honey Lake Valley as part of it, responded swiftly by creating "Honey Lake Township" and appointing a justice of the peace to preside there. The unfortunate gentleman was promptly described as "odious" and "destitute of qualifications" by the Honeylakers, who reaffirmed their conclusion that their valley was not within California and appointed a committee to wait on the newly appointed justice and "politely inform him that the citizens of this valley can dispense with his services." Aiken, *supra.*

History does not record whether the residents of Honey Lake Valley were prompted by an honest concern for geographical niceties or more opportunistic instincts. As immigrant parties came down the Lassen Trail, they were met by the local residents, who bartered provisions for their thin, travel weary horses and cattle. The livestock thus obtained was apparently fattened up for resale the following year. It was reported that tax collectors from both Plumas County and Salt

Lake City were met with the same response; they were advised they were in the wrong jurisdiction. *Ibid*; Mack, *supra,* 399–400.

The situation might well have been resolved with time, but for the intervention of the newly created territory of Nevada in 1861. Nevada's governor organized Roop County within Honey Lake Valley, appointing a sheriff and a justice of the peace, who promptly issued an injunction prohibiting his Plumas County counterpart from exercising his office. When that gentleman refused to obey the order, he was arrested and fined for contempt. When news of this reached Susanville, county seat of Plumas County, the judge there issued warrants for the arrest of the Roop County justice and sheriff for interfering with justice. Aiken, *supra*; exh. 54.

The Plumas County sheriff duly proceeded to arrest the two officers but was thwarted by the arrival of seven armed men posted by Isaac Roop. He left for reinforcements, and returned with a posse of 90 men, who found the supporters of Roop County fortified in a log house which they had christened "Fort Defiance." After a siege of several days during which the Roop County justice was wounded in the thigh, an armistice was agreed, and the governors of California and Nevada territory were asked to decide the boundary issue. Governor Leland Stanford of California appointed a commissioner to confer with the acting governor of Nevada, Orion Clemens. They agreed that two commissioners should be appointed to establish the boundary between the two states, although California's represent-

ative observed in the process that the difficulties had arisen from the "inconsiderate and hasty action" of the Nevada territorial legislature in organizing a county in territory which California had never agreed should go to Nevada. Exhs. 54–59; Aiken, *supra.*

Their effort led to authorization for the first survey of the California-Nevada boundary to be marked and posted on the ground: the Houghton-Ives survey of 1863. Cal. Stat. 1863, ch. 402; Nev. Stat. 1864, pp. 139, 308. This survey, which showed Honey Lake Valley to be unquestionably part of California, was accepted by both states until it was superseded by the 1872 Von Schmidt Survey. Aiken, *supra*; exhs. 72–73., Cal. Stat. 1864, ch. 455; Nev. Stat. 1865, ch. 31. Nevada's statute expressly anticipated the forthcoming Von Schmidt Survey. It contained a promise stating "Nothing in this act shall be construed to prevent another and different line from being established as the boundary between the two states."

Similar confusion existed along the oblique boundary, where the town of Aurora was claimed as the county seat of both Esmeralda County, Nevada, and Mono County, California. Furthermore, its citizens elected representatives to both the California and Nevada legislatures in 1862. Interestingly enough, both persons became the speaker, of their respective bodies. Swackhamer, Political History of Nevada 102 (6th ed. 1974); exh. 70.

A number of surveys were conducted in these early years. Principal among them, and most relevant to this case, are the 1863 Houghton-Ives Survey of the north-

south boundary; Daniel Major's 1867 Survey of the Oregon border; the 1872 Von Schmidt Survey of both north-south and oblique boundaries, and the 1893–1899 survey of the oblique boundary conducted by the United States Coast and Geodetic Survey.

3. Surveys of relevancy to the north-south boundary controversy

1. *The Houghton-Ives line*

The first survey of the northern segment of this boundary was one undertaken jointly by both states in 1863. California Surveyor General J. F. Houghton and Butler Ives, who was appointed commissioner for the Nevada Territory, joined in this survey which extended from the Oregon border to approximately 103 miles southeasterly of Lake Tahoe. This line, known as the "Houghton-Ives Line," was adopted by statute in both states (exhs. 72, 74); but it was observed for only ten years when it was superseded by a survey by A. W. Von Schmidt in 1872–1873. Exhs. 101–106, 135–138.

2. *Daniel G. Major's Survey of the Oregon-California boundary*

In 1867, under congressional authorization, the General Land Office contracted with Daniel G. Major to survey the boundary common to Oregon and California. Exh. 96. In 1868, as part of the survey, Major set a monument at a point he determined to be the intersection of the 42nd parallel of north latitude with the 120th meridian of longitude west of Greenwich.

3. *The Von Schmidt line*

A new survey of the boundary between California and Nevada was commissioned by the General Land Office in 1872, and completed in 1873. This survey, conducted by A. W. Von Schmidt, covered both the boundary from the intersection with the 39th parallel north latitude in Lake Tahoe to the Oregon border and the "oblique" portion from Lake Tahoe southeasterly to the intersection of the 35th parallel of north latitude with the Colorado River. This survey was accepted by the General Land Office in 1873 (exh. 130) and the amendment of the plats of public land surveys to conform with the new line was ordered. Exhs. 110, 111, 113, 134.

The portion of this survey north of Lake Tahoe, for which the plaintiff contends, is the presently marked and posted boundary between California and Nevada and has been observed by both states for over 100 years. Defendant's Response to Plaintiff's Second Request for Admissions, No. 69.

C. Surveys relevant to the oblique boundary

1. *The Von Schmidt Survey of 1873*

As previously indicated, A. W. Von Schmidt surveyed the entire California-Nevada boundary. However, reports of error in both the north-south (exhs. 161, 169, OOOO) and oblique (exhs. 114, 152, 153, 155-157, 161, 170-172, OOOO) lines led to the initiation of a new survey of the oblique boundary in 1893.

2. *The survey conducted by the United States Coast and Geodetic Survey—1893 through 1899*

Because of reports that errors existed in the "oblique" portion of the Von Schmidt Survey, Congress authorized the United States Coast and Geodetic Survey in 1893 to perform a new survey of this portion of the boundary. Exhs. 152, 153, 155, 162. Since the completion of this survey in 1899, the "Coast and Geodetic Survey Line" has been used and relied upon by both states and the "oblique" boundary. It was adopted by statute by both states in 1901 (California) and 1903 (Nevada), although Nevada repealed its statute since commencement of this litigation. Exhs. 177, 178, 183, MMMMM.

D. Nevada selections made within California

Although the Von Schmidt boundary was accepted by the General Land Office in 1873 (exhs. 135, 138, 150) and Nevada recognized this fact (exhs. 135–137, 138), Nevada continued to select internal improvement lands in reliance on the earlier Houghton-Ives line, and the United States continued to approve such selections.

The record in this proceeding shows erroneous selections (primarily of internal improvement lands) by Nevada within the State of California as follows:

1. *Prior to May 1, 1873*

Prior to May 1, 1873, the State of Nevada selected 2,138 acres from Lake Tahoe north that were within the State of California as its boundaries are delineated by the "Von Schmidt" line. Affidavit of Fred Sledd, exh. 238. Although most of this land was patented to private in-

dividuals, several parcels are still held by the State of Nevada. Exh. 209.

2. *After May 1, 1873*

The United States General Land Office and its successor, the Bureau of Land Management, continued to ratify and approve selections by the State of Nevada within California as delineated by the Von Schmidt line (a line established and accepted by the United States May 1, 1873) after it had accepted the Von Schmidt line as the California-Nevada boundary. E.g., exhs. 209, 232; Defendant's Answers to Plaintiff's Second Set of Interrogatories 49, 50, with exhs. From Lake Tahoe north to the Oregon border, some 1,484.60 acres were released by the United States without authority of law to the State of Nevada even though this land was located in the State of California by federal survey contracted for and accepted by the United States. Exhs. 209, 236–238. Although Nevada was aware of this practice, it blithely continued to sell lands which it unlawfully acquired from the public domain to private individuals. See Nevada Surveyor-General's Report of 1911, p. 27; exh. 232.

Although our researches with respect to the oblique boundary from Lake Tahoe southeasterly to the Colorado River are not completed, it is anticipated that similar findings will be made with respect to Nevada selections there. We have already discovered that some 2,000 acres of land directly south of Lake Tahoe were unlawfully selected by the State of Nevada with the approval of the United States. Exh. 237; see the Department of Interior's decision *In re Pellkofer*, exh. 216.

This situation will be exacerbated, of course, if as Nevada urges, a new survey is to be ordered from the point established by Daniel Major on the California-Oregon border. See Defendant's counterclaim, count II. Plaintiff's researches of the California-Nevada selections indicate that if a "Major's line" were to be surveyed, the title to some 34,040 acres of land from Lake Tahoe to the Oregon border selected by California from the public domain or granted to her as school lands and approved by the General Land Office would be in question. Along the border from Lake Tahoe southeasterly to the Colorado River, 13,894 acres would be similarly in jeopardy. See exhs. 209, 238.

QUESTIONS PRESENTED

A. North-south boundary

1. Was the "Von Schmidt line" lawfully observed and subsequently accepted by both states as their lawful boundary?

2. Has the "Von Schmidt line," which is the presently marked and posted boundary from Lake Tahoe and Oregon and which has been observed by both states for over 100 years, been established as the boundary between California and Nevada by the doctrine of acquiescence?

3. Should the earlier Houghton-Ives line of 1863 be re-established as the interstate boundary notwithstanding its rejection and abandonment in 1873?

4. Should an entirely new boundary be created by

surveying a projection due south from the point determined by Daniel G. Major to be the intersection of the 120th meridian of longitude with the 42nd parallel of latitude to the point of intersection of such projection with the 39th parallel of latitude even though Major's determination was made solely as part of a survey of the boundary between *Oregon* and California and no line was ever surveyed south from it?

5. Should a new survey be performed, using modern methods capable of fixing positions with unprecedented accuracy?

6. In the event a resurvey should be determined to be necessary, should it locate the 120th degree of longitude west of Greenwich as provided in California's Constitution of 1849 or the 43rd degree of longitude west of Washington as suggested in Nevada's Constitution of 1864?

B. The "oblique" boundary

1. Is the line set by the United States Coast and Geodetic Survey during the years 1893–1899 which is the presently marked and posted boundary lawfully surveyed and accepted by both states as their boundary?

2. Did the Coast and Geodetic Survey line, which was statutorily recognized and observed by both states for 78 years become the boundary between California and Nevada by the doctrine of acquiescence?

3. Is the earlier but discredited and long-superseded Von Schmidt Survey from Lake Tahoe southeasterly to the Colorado River the boundary?

4. Should the partially surveyed Houghton-Ives line

southeasterly of Lake Tahoe, which was never completed or used by either state, be extended to the Colorado River thereby creating a new boundary?

5. Should a new boundary be created by surveying a projection from the point identified by Daniel Major in 1867 as the intersection of the 120th meridian and the 42nd parallel due south to the 39th parallel of latitude and then southeasterly to the intersection of the 35th parallel of latitude with the Colorado River?

C. Should there be a new survey of both lines using modern technology?

D. Where should the north-south and oblique boundaries be joined in Lake Tahoe?

E. Assuming the validity of the presently recognized lines, what is the status of the more than 5,000 acres of land invalidly selected by Nevada within California?

Exhibits A, B, and C show approximately the geographical positions and the respective lines at issue and are set forth in the appendix herein.

SUMMARY OF ARGUMENT

California's eastern boundaries were fixed in her 1849 Constitution, never to be changed without her consent. Although in her early days as a territory and state, Nevada made several efforts to persuade California to cede lands east of the Sierras to her; these efforts were never successful.

A number of surveys were made along the California-Nevada border. These efforts, made under unfavorable conditions and often with inadequate equipment, finally culminated in the lines which were accepted by both states in 1873 (with respect to the boundary from Lake

Tahoe to Oregon) and 1901 (Lake Tahoe to the Colorado River), and have been observed by them ever since. They should be declared by this Court to constitute the lawful boundaries between California and Nevada.

Should this Court decline to find that the presently marked and observed lines constitute the lawful boundary, a new survey should be ordered to fix precisely the location of California's constitutionally-set eastern border.

Assuming this Court declares that the present lines constitute the lawful boundary, the Special Master should be authorized to hold further conferences and hearings on the legality of selections made by Nevada within the State of California. The United States should be invited to participate in these proceedings inasmuch as the apparently unlawful selections were made with her acquiescence and approval. The rights of the two states, the federal government, and purchasers from Nevada should be determined with respect to such selections, inasmuch as opinions of this Court and the Department of the Interior indicate that patents resulting from such extra-territorial selections may be invalid.

ARGUMENT

I

THE VON SCHMIDT SURVEY OF 1873 AND THAT OF THE COAST AND GEODETIC SURVEY OF 1893–1899 MARKED THE INTERSTATE BOUNDARIES

A. The United States has authority to survey the boundaries of states, and has often done so in the past

As the Special Master observes, there appears to be no

authority for the proposition that the United States lacks the authority to survey the boundaries of states. Special Master's Report 46. Indeed, all the authority is to the effect that federal surveys of the public domain may be repeated and altered without limit so long as there is no interference with the rights of others. *U.S.* v. *State Investment Co.* (1924) 264 U.S. 206. The record of history shows no distinction with respect to the validity of surveys made by the United States and those made by others. E.g., *Louisiana* v. *Mississippi, supra*, 202 U.S. 1, 57. Indeed, it appears that both California and Nevada clamored for a federal survey, and welcomed it once it was performed. Exhs. 45–50, 62, 80–85, 155–156, 163–164. Two motives are apparent for this enthusiasm. The most obvious is economy. The surveys performed were costly and dangerous. They covered rough territory and required extensive supplies, equipment and, to some extent, protection from unfriendly Indians. The second is that they facilitated the disposition of the public domain, and in the halycon days of the late nineteenth century, the public lands were in great demand. E.g., Dunham, Some Crucial Years of the General Land Office, 1875–1890, reprinted in the Public Lands, Carstensen, Ed. (1968); Townely, Management of Nevada's State Lands, 1864–1900, 17 Journal of the West 63 (Jan. 1978); Dunham, Government Handout, A Study in the Administration of the Public Lands 1875–1891 (1941); Nash, The California State Land Office 1858–1898, 27 Huntington Library Quarterly 347 (1964).

B. The Von Schmidt line was accepted by both California and Nevada since its initial establishment in 1873. It has been observed ever since that date as marking the north-south boundary between the states

Nevada's objections to the Von Schmidt line at this time seem hollow when compared to the acceptance which that line won within that state in the 1870's. Anticipating the completion of the Von Schmidt Survey, the Nevada Surveyor General reported:

> "Thus it will be seen that, by the munificence of the General Government, that [sic] within a year the State will be inclosed by an actual surveyed line and monuments, and the troubles heretofore existing, to State and county officials, in dealing with an imaginary line, will be entirely and forever obviated.
>
> "This department, more particularly perhaps than any other, feels the immediate necessity of established State lines. In the selection and sale of lands, it is important to know beyond a doubt that they are within this State, otherwise much confusion, trouble, and delay must necessarily be the result." Rep. of the Surveyor General and State Land Register of the State of Nevada for the years of 1871 and 1872, exh. 114.

The Nevada State Controller promptly recognized the new line, exhibit 136, and the Legislature utilized it in redefining Nevada County boundaries. Exh. 137. Nevada has candidly admitted that the Von Schmidt line is the one presently marked and posted between the two states, and as the Special Master points out that its state and local agencies have uniformly observed it. Special Master's Report 35–36; Defendant's Answers to Plain-

tiff's First Set of Interrogatories, Nos. 9–11. The fact that neither state took steps to repeal its previous statutory recognition of the outmoded Houghton-Ives line until recently (i.e., exhs. 72, 74, 76) may cast enough doubt to warrant requesting the intervention of this Court, but not enough to change the logical conclusion that the presently-marked boundaries were accepted by the states and remain in effect.

C. The oblique boundary as surveyed by the Coast and Geodetic Survey in 1893–1899 was promptly accepted by both states. Their acceptance was manifested both in practice and by statute

The Coast and Geodetic Survey line was not only accepted in fact by both states upon its completion (Special Master's Report 36–37) but was accepted by statute as well; at least until Nevada took steps to repeal its recognition after filing her counterclaim in this action repudiating the line. Special Master's Report 36; exhs. 177, 178, MMMMM.

II

THE LINES PRESENTLY MARKED ON THE GROUND AND OBSERVED BY THE STATES MARK THE LAWFUL BOUNDARIES BY ACQUIESCENCE

The Special Master has eloquently outlined the principles of acquiescence, and concluded that these principles are applicable to the case at hand. Special Master's Report 41–48. As he points out therein:

> ". . . Nevada has admitted that both states have exercised since 1873 and continue to exercise jurisdiction and sovereignty up to the Von Schmidt

north-south line, and that it has not requested a resurvey of this line. By statute California adopted the U.S. Coast and Geodetic Survey's oblique line in 1901 and Nevada adopted it in 1903. The line has been in use ever since with both states exercising jurisdiction and sovereignty up to it. Thus the doctrine of prescription and acquiescence becomes applicable here." *Id.*, at p. 45.

The observation of this Court in *Indiana* v. *Kentucky*, cited by the Special Master in his report, is particularly applicable here:

"It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. . . . On that day, [date of statehood] and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. . . .

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to

be overcome, except by the clearest and most unquestioned proof. . . ." *Indiana* v. *Kentucky* (1890) 136 U.S. 479, 509–510.

The facts considered by this Court in *New Mexico* v. *Colorado* (1925) 267 U.S. 30, are strikingly similar to those demonstrated in this proceeding. They include the impositions of the burdens of citizenship such as the collection of taxes and the requirement of jury duty service (*Virginia* v. *Tennessee* (1893) 148 U.S. 503, 524; *Missouri* v. *Kentucky* (1870) 78 U.S. (11 Wall.) 395, 402; *Indiana* v. *Kentucky, supra*, 136 U.S. 479, 510; *Maryland* v. *West Virginia* (1909) 217 U.S. 1, 41) acts of jurisdiction extending the benefits of citizenship to persons in the area such as the right to vote in statewide and local elections, the right of access to the courts, the improvements of roads, highways and public buildings, the provision of police and fire protection, and the provision of schools. *Virginia* v. *Tennessee, supra*, 148 U.S. 503, 524; *Maryland* v. *West Virginia, supra, Missouri* v. *Kentucky, supra; Michigan* v. *Wisconsin* (1926) 270 U.S. 295, 307; *Vermont* v. *New Hampshire* (1933) 289 U.S. 593, 616. The court has also considered the establishment of county and other district boundaries on the basis of the line to which jurisdiction is asserted (*Missouri* v. *Iowa* (1849) 48 U.S. (7 How.) 660, 677; *Indiana* v. *Kentucky, supra*) and the court has considered in almost every case whether or not public lands were claimed by the state and were granted to private parties on the basis of the line. *Maryland* v. *West Virginia, supra,* 217 U.S. 1, 41; *New Mexico* v. *Colorado, supra,* 267 U.S. 30, 41; *Missouri*

v. *Kentucky, supra*, 78 U.S. (11 Wall.) 395; *Louisiana* v. *Mississippi, supra*, 202 U.S. 54; *Massachusetts* v. *New York* (1926) 271 U.S. 65; *Michigan* v. *Wisconsin, supra*, 270 U.S. 295; *New Mexico* v. *Texas* (1927) 275 U.S. 279, 298; *Vermont* v. *New Hampshire, supra*, 289 U.S. 593, 614. Also considered are acts by a state specifically identifying the boundary and placing the neighboring state on notice of the claim of sovereignty such as court decisions defining the boundary and the identification of the boundary or official maps. *Indiana* v. *Kentucky, supra*, 136 U.S. 479; *Ohio* v. *Kentucky* (1973) 410 U.S. 641, 648–649; *Louisiana* v. *Mississippi, supra*, 202 U.S. 54, 55–58; *Arkansas* v. *Tennessee* (1940) 310 U.S. 563, 568.

The length of time required to ripen acts of jurisdiction into a substantive right is not a set period. In *Rhode Island* v. *Massachusetts* (1846) 45 U.S. (4 How.) 590, the possession under the claim of rights had lasted 200 years. However, in *Missouri* v. *Iowa, supra*, 48 U.S. (7 How.) 660, the court made a finding of acquiescence by Missouri in the claims of Iowa over a period of only 30 years. In most cases, the period of time sufficient to support application of the doctrine has been less than 100 years. *Virginia* v. *Tennessee* (85 Years); *Maryland* v. *West Virginia* (70 years); *New Mexico* v. *Colorado* (54 years); *Missouri* v. *Kentucky* (42 years); *Indiana* v. *Kentucky* (70 years); *Louisiana* v. *Mississippi* (90 years); *Michigan* v. *Wisconsin* (75 years); *New Mexico* v. *Texas* (75 years); *Vermont* v. *New Hampshire* (120 years); *Massachusetts* v. *New York* (140 years); *Arkansas* v. *Tennessee* (115 years); *Ohio* v. *Kentucky* (150 years). The duration re-

quired seems to depend upon the extent to which the states and the private parties have relied upon the line.

A temporary break in the use of line will not prevent operation of the doctrine. Thus, it appears that the presently established boundaries, accepted and acquiesced in by Nevada for so many years, should be confirmed. Indeed, these were the publicly expressed views of a former Nevada Attorney General. Exh. 42.

A. Over 100 years of acquiescence compel the conclusion that the accepted and agreed-on boundary between the 39th and 42nd parallels of north latitude is the "Von Schmidt line"

1. *The Von Schmidt line of 1872 has been respected by California, Nevada and the United States as the interstate boundary north of Lake Tahoe from the time of its approval by the General Land Office in 1873 to the present*

The presently marked and the posted boundary line between the States of California and Nevada north of Lake Tahoe is the line surveyed and monumented by A. W. Von Schmidt in 1872. Since 1873, both California and Nevada have exercised and continued to exercise political jurisdiction and sovereignty up to this line. No other line has been observed in fact by either state since that time. The State of Nevada has admitted, in its response to Plaintiff's Second Request for Admissions, No. 69, that the presently marked and posted boundary line between the two states north of Lake Tahoe is the line surveyed and monumented by Von Schmidt in 1872.

Furthermore, Defendant State of Nevada has indicated in its responses to plaintiff's interrogatories that its state and local agencies have uniformly observed the

presently posted and marked boundary line since their creation. The defendant's responses to these interrogatories are summarized as follows:

a. The Nevada Highway Patrol Division uses and relies upon the presently marked boundary in the performance of its duties; it has done so since its creation in 1949; it has not exercised jurisdiction west of the Von Schmidt line except in cases of hot pursuit; it has not resisted the exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 9, 10, 11.

b. The Nevada Department of Highways uses and relies upon the presently marked boundary and has done so since its creation in 1917; it has not constructed nor maintained highways or roads nor otherwise exercised its powers west of the Von Schmidt line; it has never resisted the exercise of jurisdiction by California between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 12, 13, 14.

c. The Revenue Division of the Nevada Department of Taxation uses and relies upon the line indicated on maps of general distribution which is assumed to be the presently marked and posted boundary line; it has used the Von Schmidt line since it was surveyed as far as that agency's records indicate; it has not required a place of business located west of the presently posted boundary line to register or otherwise comply with the excise tax laws of Nevada because of that location and it has not

resisted the assertion of jurisdiction by California up to the presently posted and marked line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 15, 16, 17.

d. The Nevada Division of State Lands uses and relies upon the presently marked and posted boundary line; it has never resisted the exercise of jurisdiction and ownership by the State of Californa in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 18, 20.

e. The Nevada Department of Education uses and relies upon the presently posted and marked line; it has done so since the department was created in 1956; and it has not performed any act or exercised its powers west of the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 21, 22.

f. The Nevada Department of Forestry uses and relies upon the presently marked and posted boundary line; it has done so since the division was established in 1952; it does not contend that it exercises its jurisdiction west of the Von Schmidt line except pursuant to agreements with the supervisors of the United States National Forests pertaining to firefighting services on United States forest lands; it has never resisted the exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 24, 25.

h. The Nevada Gaming Commission and State Gam-

ing Control Board have relied upon and used maps of general distribution which are assumed to indicate the presently posted and marked boundary line for purposes of establishing their jurisdictions; they have done so since the board was created in 1955; they are not aware of ever having licensed a gaming establishment west of the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 27, 28.

i. The Washoe County Assessor uses and relies upon the presently marked and posted boundary line; it has never assessed property, collected property taxes or otherwise exercised its powers west of the Von Schmidt line; it has never resisted the acts of assessment or collection of property taxes by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 29, 30, 31.

j. The Washoe County Registrar of Voters uses and relies upon the presently posted and marked boundary; it has done so since 1948. Defendant's Responses to Plaintiff's First Set of Interrogatories, No. 32.

k. The Washoe County Sheriff's Office uses and relies upon the presently posted and marked boundary line; it has never resisted the exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 34, 35, 36.

l. The Washoe County School District uses and relies upon the posted line as presently marked on the ground for school district purposes; it has not attempted to en-

force truancy laws west of the present boundary line. Defendant's Response to Plaintiff's First Set of Interrogatories, No. 37.

m. The Washoe County Department of Public Works uses and relies upon the presently posted and marked boundaries; it has not built nor maintained public works nor otherwise exercised its powers west of the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 39, 40.

n. The Nevada Department of Motor Vehicles uses and relies upon the presently posted and marked boundary; it has not performed acts nor otherwise exercised its powers west of the Von Schmidt line; it has not resisted exercise of jurisdiction by California in the area between the Houghton-Ives and the Von Schmidt lines. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 48, 49, 50.

o. The Nevada National Guard uses and relies upon the presently posted and marked boundary line; it has been the line adopted by the United States Geographical Survey which has been adopted by the Army Map Service, Corps of Engineers, United States Army, Washington, D.C.; it has not performed acts or otherwise exercised its powers west of the Von Schmidt line but for joint firefighting operations; it has not resisted exercise of jurisdiction by California in the area between the Houghton-Ives line and the Von Schmidt line. Defendant's Responses to Plaintiff's First Set of Interrogatories, Nos. 52, 53, 54.

Further official recognition by the State of Nevada of

the Von Schmidt line, as its western boundary from Lake Tahoe to the Oregon border, may be seen in the following official maps:

1. Nevada Map Atlas, produced by the Nevada State Highway Department in cooperation with the United States Department of Transportation quadrangle maps Nos. 1-12, 2-12, 3-12, 4-12, 5-12, 6-12, and the Mount Rose quadrangle and Carson City quadrangle. Exh. 139. Defendant has admitted in its response to Plaintiff's Second Request for Admissions, No. 86(J), that these quadrangle maps represent the location of the northern segment of the boundary between California and Nevada as the line surveyed by Von Schmidt in 1872.

2. The Washoe County Engineer's Taxation Boundaries Map No. 16, 1979. Exh. 207.

3. The Washoe County Engineer's Taxation Boundaries Map No. 70, 1975. Exh. 208.

B. The "oblique" boundary between California and Nevada should be established as the United States Coast and Geodetic Survey line accepted by both states in fact and in law since its establishment in 1900

The States of California and Nevada in 1901 and 1903 respectively, legislatively adopted the United States Coast and Geodetic Survey's surveyed line as their true correct and legal boundary line between the 39th and 35th parallels of latitude. Exh. 177, Stats. 1901, ch. 73; exh. 178, Nev. Stats. 1903, ch. 15; Defendant's Answers to Plaintiff's Second Request for Admissions, Nos. 60(a), 61. Both states also currently recognize the United States Coast and Geodetic Survey surveyed line as their mutual boundary along the "oblique" line in their respective statutes. Stats. 1978, ch. 369; exh. 76, *supra;* Nev. rev.

Stats. 1977, vol. 9, tit. 19, ch. 234, exh. 183. Moreover, both California and Nevada in their respective interstate compacts with the State of Arizona, adopted the point established as the intersection of the 35th degree of north latitude with the Colorado River set by the 1899 Coast and Geodetic Survey as their mutual boundary. Nev. Stats. 1960, ch. 119, exh. 179; exh. 185, Interstate Compact, California and Arizona, March 12, 1963; exh. 184, USGS Technical Bulletin 27, August 1965. The United States Government consented to both of the aforesaid interstate compacts. Exh. 181, 75 Stat. 93 (1961); exh. 180, 80 Stat. 340 (1966). Furthermore, defendant has admitted in its response to California's Second Request for Admissions, No. 57(a), that the point established as the intersection of the 35th degree of north latitude with the Colorado River by the 1899 Coast and Geodetic Survey is identical with the points set forth in the 1961 Arizona-Nevada Boundary Compact and the 1966 Arizona-California Boundary Compact.

The interstate "oblique" boundary line presently marked and posted on the ground is the line surveyed by the United States Coast and Geodetic Survey. Defendant has admitted this fact in its Response to Plaintiff's Second Request for Admissions, No. 62.

Defendant has admitted that the Nevada Department of Motor Vehicles, the Nevada National Guard, the Nevada Department of Resources and the Nevada-Tahoe Regional Planning Agency all use and rely upon the presently posted and marked boundary in the exercise of their duties. Defendant's Response to California's Second Request for Admissions, No. 67.

Nevada has admitted that this line has been adopted by the United States Geological Survey, the Army Map Service, the Corps of Engineers, and the United States Army. Defendant's Response to California's Second Request for Admissions, No. 68.

The defendant has further admitted that the following Nevada state and local agencies have utilized the United States Coast and Geodetic Survey "oblique" line since its initial establishment: the Nevada Department of Taxation, Revenue Division, the Nevada Division of State Lands, the State Lands Registrar, the Nevada Highway Patrol Division, the Nevada Department of Highways, the Nevada Department of Education, the Nevada Department of Forestry, the University of Nevada and the Nevada Gaming Commission and State Gaming Control Board. Defendant's Response to Plaintiff's Second Request for Admissions, No. 63.

Defendant has admitted the the County Assessors of Esmeralda, Douglas, Lyon, Mineral, Nye, Clark, and Ormsby have recognized the United States Coast and Geodetic Survey "oblique" boundary line in assessing and collecting property taxes and that the sheriffs of these counties have accepted the above line in the exercise of their jurisdiction. Defendant's Responses to Plaintiff's Second Request for Admissions, Nos. 64, 65.

And she has admitted that the Department of Public Works of these counties have not built or maintained public works, nor have they otherwise exercised jurisdiction west of the United States Coast and Geodetic

Survey line. Defendant's Response to Plaintiff's Second Request for Admissions, No. 66.

The United States Post Office delineated the United States Coast and Geodetic Survey line as the boundary between California and Nevada in its Post Route Map of the States of California and Nevada published in 1917. Exh. 204, *supra;* Defendant's Response to Plaintiff's Second Request for Admissions, No. 87(b). Defendant has admitted, in her Response to Plaintiff's Second Request for Admissions, No. 87(a) that the United States Coast and Geodetic Survey line is depicted as the interstate boundary line in the following Nevada State Highway Department Quadrangle Maps: 7-12, 8-11, 8-10, 9-9, 10-8, 10-7, 11-7, 11-6, 12-5, 12-4, 13-4, 13-3, 14-3, and 14-2. Exh. 139, *supra,* Nevada Map Atlas.

III

THERE IS NO BASIS IN LAW OR FACT FOR CREATING A NEW LINE BY PROJECTING SOUTH FROM THE POINT DETERMINED BY DANIEL G. MAJOR TO BE THE INTERSECTION OF THE 120TH MERIDIAN OF WEST LONGITUDE WITH THE 42ND PARALLEL OF NORTH LATITUDE SOUTH TO THE 39TH PARALLEL OF NORTH LATITUDE AND THEN FURTHER PROJECTING SOUTH-EASTWARD TO THE INTERSECTION OF THE COLORADO RIVER WITH THE 35TH PARALLEL OF NORTH LATITUDE

In count II of her counterclaim, the defendant asks this Court to devise a boundary by connecting with lines three points: A point set by Daniel Major in connection with the survey of the Oregon-California boundary; the

unlocated point where a line drawn due south from Major's point would intersect the 39th degree north latutude; and a point allegedly set by Lieutenant Joseph C. Ives at the Colorado River. There is no legal authority for the establishment of such a boundary in this way.

The argument that establishment of a monumented point creates an interstate boundary line was directly considered and rejected in *Oklahoma* v. *Texas* (1925) 272 U.S. 21. Texas argued that its common boundary with Oklahoma along the north-south segment of the panhandle should be established as a line running due north from a point known as the Kidder Monument set by a surveyor commissioned by the Department of the Interior to set the point of intersection of the true 100th meridian with the South Fork of the Red River and adopted by Congress as such. The court rejected the argument of Texas and ordered a resurvey using more accurate modern techniques. *Id.,* at p. 49.

Furthermore, defendant has failed to present any facts which would indicate any other basis for a decree establishing such a line as the boundary. There has been no evidence offered to show that either state has used such a proposed line.

Notwithstanding the lack of legal foundation for this proposed line, there is evidence which shows that Daniel Major's location of the intersection of the 42nd parallel of latitude with the 120th meridian of longitude was found to be inaccurate. In 1867, Congress authorized the Commissioner of the General Land Office to contract for a survey of the Oregon-California boundary.

14 Stat. 457, 465; exh. 95. Based on this authority, the General Land Office contracted with Daniel G. Major, United States Astronomer and Surveyor, to perform the survey of the border common to California and Oregon. Pursuant to his contract, Major agreed to establish, by astronomical observations, the 42nd parallel of north latitude at the point of intersection with the 120th meridian west from Greenwich and survey and mark the parallel west to the Pacific Ocean. Exh. 96, Major's contract, October 1, 1867. Therefore, the purpose for which Daniel Major was employed was to determine the boundary between California and Oregon and not the boundary between California and Nevada.

Major's contract indicates that he was instructed to determine the intersection of the 42nd parallel with 120th meridian by means of astronomical observations. He was not instructed to determine the location of the 120th meridian by means of time signals or the use of a telegraph, which at that time was considered to be the most accurate means for determining longitude. Exh. 98, Report of Commissioner of General Land Off. to Sect. of the Interior (1870), pp. 463–466. Although there is no evidence to indicate that a telegraph was available to Daniel Major at a place close to the 42nd parallel, had this been essential to his survey, it would have been feasible, although possibly more expensive, to make arrangements with the Central Pacific Railroad to take telegraphic readings in the vicinity of Verdi, Nevada, as Professor Davidson did a few years later. The defendants have admitted, in response to Plaintiff's Second Re-

quest for Admissions No. 29, that Major did not use a telegraph in determining his astronomic positions.

A number of comments and assessments have been made relating to the accuracy of Major's observations. James T. Gardner, in his Notes on the California Boundaries (exh. 77), describes the method by which Major established an observatory and took observations at Camp Bidwell and made his way to the point at which he determined was the intersection of the 42nd parallel with the 120th meridian. He states that Major took no observations at this terminal point. This fact, coupled with the fact that he had noted a connection with some of the measurements of line marks of the Houghton-Ives Survey of the 120th meridian, and thereby became aware of a discrepancy (exh. 98), between his previous survey, would seem to indicate that had the establishment of this particular corner been essential, observations would have been taken at the point Major determined to be the location of the 120th meridian or at least some other confirmatory observations would have been made.

The discrepancy between the Houghton-Ives Survey and the location by Daniel Major of the 120th meridian was pointed out by the Commissioner of the General Land Office in his report of 1870 to the Secretary of the Interior. He suggests that the matter could better be resolved by utilizing a telegraph at the point of intersection at the 120th meridian of longitude with the line of the Central Pacific Railroad. Exh. 98, *supra.*

Francis S. Landrum, defendant's expert witness,

makes the following assessments of Daniel Major's location of the corner in question:

> "The present appraisal of Major's line, a century later, shows that he ran a mediocre to average survey, considering the conditions under which he worked and further considering that his line was 'open end'—that is, it did not return upon itself to supply a means of checking. However, others have done much better." Nev. exh. PPPP, *supra,* at p. 45.

Mr. Landrum further explains his opinion as to the source of Daniel Major's error. He states:

> "To try to understand Major's apparent discrepancy, one must recall that the Greenwich and Washington meridians were regarded as being *exactly* 77° apart, when in reality there were 03′ 02″.3 more than 77° apart. Major's observational records continually refer to Washington *and* Greenwich meridians. Comparing data: Major missed the Greenwich line 03′ 41″.5; Washington and Greenwich differ by an integral number of degrees plus 03′ 02″.3. If the difference (39.2″ of longitude) is translated to *time* in longitude, it is 2.61 seconds. If 2.61 seconds of time in longitude is further translated to a timing error in moon transit, it is in the order of $^{9}/_{100}$ths of a second. To Major's astronomical efforts at Camp Bidwell must be assigned either of two criticisms, vis: (a) he missed a determination of a Washington meridian by less than $^{1}/_{10}$th of a second observational error; or (b) 1,965 lunar and stellar transits with his ironbased spy glass were unfirmly wrong." *Id.,* at p. 53.

Discrepancies between the Houghton-Ives Survey and the Daniel G. Major Survey relating to the location of the 120th meridian led to the Von Schmidt Survey.

Soon after Daniel G. Major completed his survey of the 42nd parallel of latitude in which he had located the intersection of the 120th meridian of longitude therewith, discrepancies were noted between the location of this intersection or corner determined by Major and the corner located by the previous Houghton-Ives Survey. The Secretary of the Interior, in his report to Congress in 1870, pointed out that on review of Daniel Major's field notes, computations and map a considerable discrepancy was found in longitude between the monument fixed by the two survey expeditions for the northeast corner of the State of California. Exh. 98, *supra,* Rep. of Sect. of the Interior to Cong. 1870. In 1871, the Commissioner of the General Land Office, in his report to the Secretary of the Interior, indicates that the survey work of Daniel Major in locating the northeast corner of California in 1868, raises serious doubt as to the accuracy of the earlier Houghton-Ives line. He goes on to state:

> "So great a discrepancy ought not, therefore, to pass unnoticed; and since the survey of 1863 has never been recognized by Congress as the true boundary line between California and Nevada, it is deemed of the highest importance that a new determination of the point of intersection of the one hundred and twentieth meridian with the thirty-ninth parallel, and a resurvey of the boundary to its intersection with the forty-second parallel of north latitude, be ordered by Congress." Exh. 101, Rep. of Comr. of the Gen. Land Off. (1871), pp. 21–22.

As Francois D. Uzes, expert witness for plaintiff,

points out in his report to the California State Lands Commission, when the Federal Government became aware, in about 1870, of the difference in position between the 1863 line and the point set by Daniel Major in 1868 as the northeast corner of California, it contracted with A. W. Von Schmidt to survey the entire eastern boundary of California. Exh. 12, *supra,* Cal.-Nev. Boundary, State Lands Commission, March 25, 1977; exh. 102, letter, Drummond to Von Schmidt, July 11, 1872; exh. 103, letter, Drummond to Von Schmidt, August 2, 1872; exh. 133, Von Schmidt contract, 1872. This, of course, was authorized by an appropriation by Congress. Exh. 104, 17 Stat. 347 (1872) at p. 358. As pointed out above, the discrepancy between the Houghton-Ives Survey and the corner located by Daniel Major caused the Surveyor General of the State of Nevada in his report to the Governor to state:

> "An error was discovered in the established initial point of the western boundary between this State and California, of so great a magnitude as to induce Congress to pass an Act, approved June tenth, eighteen hundred and seventy-two . . . authorizing the resurvey. . . ." Exh. 114, *supra,* Rep. of Surveyor Gen. of Nevada (1871–1872) at p. 7.

Thus, it appears that construction of a new line from Major's corner would, as the Special Master suggests, "defy all principles of law and logic." Special Master's Rep. 46.

IV

THE NORTH-SOUTH BOUNDARY BETWEEN CALIFORNIA AND NEVADA IS MARKED BY THE 120TH MERIDIAN WEST FROM GREENWICH AND NOT THE 43RD MERIDIAN WEST FROM WASHINGTON

California's eastern boundary from Oregon to Lake Tahoe was set by her constitution as the 120th meridian west from Greenwich, and California was admitted into the Union September 9, 1850, with that boundary. Exhs. 5, 6. Shortly afterward, Congress adopted a practice then fashionable in an age of nationalism, and provided that Washington, not Greenwich, should be this country's prime meridian for astronomical purposes. Exh. 186, Act of Sept. 28, 1850, ch. 53, 9 Stat. 513–515. This act was subsequently repealed in 1912 after limited use. 37 Stat. 342 (1912), exh. 201; see generally Culley, Meridians of Washington, exh. 200. Nevada's act of admission approved a description in her constitution providing, insofar as is relevant here, that her western boundary with California should extend ". . . to the forty third degree of Longitude West from Washington; thence North along said forty third degree of West Longitude, and said eastern boundary line of the State of California to the forty second degree of North Longitude . . . ." Exhs. 18–21.

What is generally recognized now but was apparently unknown to the constitutional draftsmen of Nevada was that the locations of the 120th meridian west from Greenwich and the 43rd meridian west from Washing-

ton were not located at exactly the same place. In fact, the 43rd meridian, if located on the ground, would be approximately 2.5 to 2.7 miles west of the 120th meridian. Exh. 42, memo, Foley to Legislative Counsel of Nevada, May 9, 1962; Nev. exh. PPPP, *supra*, Oregon Historical Quarterly; Defendant's Responses to Cal. 2nd Request for Admissions No. 80. However, during the time of the Nevada Territory and at the time of its statehood, these meridians were generally thought to be located at the same place. Exh. 42, *supra;* Nev. exh. PPPP, *supra;* exh. 192, De Groot's Map. Nev. and Cal. 1st set of Interrogatories.

DeGroot's Map represented both the 43rd meridian and the 120th meridian as being identical and as being the boundary between California and Nevada. This was the map used by Nevada Territorial Governor Orion Clemons during the negotiations to resolve the Honey Lake boundary controversy in 1863. Defendant's Response to Cal. 2nd Request for Admission, No. 81(c). Also, the First Directory of the Nevada Territory published in 1862 (exh. 191) equated the two meridians. Defendant's Response to Plaintiff's 2nd Request for Admissions, No. 81(e). Further, the reports of the Nevada Surveyor General, from the years 1865 through 1886, referred to this portion of the interstate boundary as being both the 43rd and the 120th meridians. Exhs. 189, 190, and 194 through 198, Nev. Surveyor General Reps.

The only reasonable explanation for the apparent discrepancy between the states' constitutionally created mutual boundary is that the locations of 120th and the

43rd meridians were thought to be identical. This is so for the reasons stated in the previous paragraph as well as for the reasons that both the Territory and the State of Nevada were *expressly* limited on the west by the State of California's eastern boundary. Exhs. 14, *supra*, 18, *supra*, 19, *supra*, 21 *supra* and Congress is expressly prohibited from taking land from one state and giving it to another. Art. IV, § 3, U.S. Const.; *Louisiana* v. *Mississippi, supra*, 202 U.S. 1; exh. 42, *supra*, Foley memo.

Therefore, any effort to grant territory lying within the boundaries of the State of California to the newly formed State of Nevada would have been unconstitutional. *Louisiana* v. *Mississippi, supra*, 202 U.S. 1; accord *Washington* v. *Oregon supra*, 211 U.S. 127.

Nevada, both during its territorial period and after statehood, did approach the State of California to seek a cession of California's territory located east of the dividing ridge or east of the Sierra Nevada but California rejected the overtures. Exhs. 28–37, 40–44.

Indeed, Nevada's first state governor acknowledged that Nevada's boundary must be limited by California.

> "An issue formerly existed between the State of California and the Territory of Nevada, as to the true location of the line dividing the two jurisdictions. We have defined our limits on the west by the eastern boundary of that State. Hence, the line has been established, unless negotiations with our sister State result in her relinquishment to us of the district in question, which would be of value to us and is of little importance to her." (1st Ann. Message of H. G. Blasdel, Governor of the State of Nev. exh. 32.)

Moreover, although the American Meridian System was adopted for astronomical purposes, the 43rd meridian has never been surveyed nor monumented as the interstate boundary between the states of California and Nevada (Defendant's Response to Plaintiff's 2nd Request for Admissions, No. 83; Landrum testimony, RT, pp. 325, 334) nor has it been used by either state as their mutual boundary. (Defendant's Response to Plaintiff's 2nd Request for Admissions, No. 84.)

V

THE COURT SHOULD ORDER A NEW SURVEY IF IT FINDS THAT THE VON SCHMIDT NORTH-SOUTH LINE AND THE UNITED STATES COAST AND GEODETIC SURVEY OBLIQUE LINE ARE NOT THE LAWFUL BOUNDARY

A. The court has inherent power to order a resurvey

Where the location of an interstate boundary is in dispute and where there is insufficient evidence to invoke the principle of acquiescence, the court has inherent power to order a resurvey. *Oklahoma* v. *Texas, supra*, 272 U.S. 21.

In *Oklahoma* v. *Texas, supra*, this court decided the location of the boundary between the states along the 100th meridian of longitude from the Red River to the parallel of 36° 30′ north latitude which constitutes the eastern boundary of the panhandle of Texas and the main western boundary of Oklahoma. Several surveys had been made of the 100th meridian between the years

of 1859 and 1902. Oklahoma and the United States, as intervenor, contended that the proper boundary was that line derived from an 1859 survey on the basis of res judicata of a previous judgment. Oklahoma also asserted that line on the basis of the doctrine of acquiesence and Texas maintained that the boundary should be a line running north from a monument set by the direction of Congress and approved by the Secretary of the Interior established in 1902 which fell eastward of the 1859 line.

This Court rejected the contention of Oklahoma and the United States that res judicata controlled. It rejected the contention of Texas because Congress did not authorize the running of a line northward from the approved monument; and it rejected the contention of Oklahoma based on acquiescence because the essential element of exercise of jurisdiction acquiesced in for a long period of years was lacking. This Court held that the boundary line was the true 100th meridian and ordered that the line be accurately located under the direction and approval of the Court.

It would seem, therefore, when the location of an interstate boundary line is still in doubt after all the evidence has been considered, the court has inherent power to order that a survey be made to determine the proper location of such boundary.

B. Modern surveying methods are capable of locating boundaries with great accuracy

During the fall of 1978, the California State Lands Commission requested the National Geodetic Survey (NGS) of the National Ocean Survey (NOS) to verify

the reported position of the 120th meridian of longitude as set forth in the Sinclair Report appended to the Report of the United States Coast and Geodetic Survey Annual Report of 1900. As a result of this request the NGS made astronomic determinations of three of the interstate boundary monuments in issue in this litigation in the vicinity of Lake Tahoe and filed a draft report with the California State Lands Commission. This report (exh. 239) illustrates the technology and techniques used by the United States government in making astronomic determinations of latitude and longitude, and their great accuracy compared to those used one hundred years ago.

Although there are several modern techniques designed for or capable of locating points generally on the earth with remarkable precision, of particular note is a new system which has revolutionized the measuring of geographical boundaries and which is well suited to locating the boundary in question. This system is called ARIES (Astronomical Radio Interferometric Earth Surveying) and was developed by the California Institute of Technology's Jet Propulsion Laboratory in conjunction with the National Aeronautics and Space Administration (NASA). Very simply, this system is a Very-Long-Baseline Interferometry (VLBI) technique which operates by measuring from two or more stations relative arrival times of radio signals transmitted by quasars and radio galaxies billions of light years away. Because ARIES is a radio astronomic technique and does not depend upon gravity as an earth reference, it is capable of making

extremely accurate geographic determinations free of the major sources of error caused by the gravitational force, the wobble of the earth's axis, and the inaccuracy of time signals typically associated with traditional optical methods. C. C. Counselman, III, Very-Long-Baseline Interferometry Techniques Applied to Problems of Geodesy, Geophysics, Planetary Science, Astronomy, and General Relativity, Proceedings of the IEEE (September 1973), vol. 61, No. 9, p. 1225; Peter F. MacDoran, *Radio Interferometry* for International Study of the Earthquake Mechanisms, Acta Astronautica (Pergamon Press 1974) vol. 1, pp. 1427–1444. It would appear that a precise survey of the constitutional boundaries could be made by this method.

VI

ASSUMING THIS COURT DECLARES THE BOUNDARIES OF CALIFORNIA TO BE THOSE RECOMMENDED BY THE SPECIAL MASTER, THE COAST AND GEODETIC SURVEY LINE SHOULD BE EXTENDED NORTHWESTERLY TO THE VON SCHMIDT LINE IN LAKE TAHOE

Although the actual 120th meridian may be joined with the 39th parallel as envisaged by the California Constitution of 1849, the lines which the Special Master recommends this Court adopt as the north-south and oblique boundaries may not. A visual depiction of the problem, and various ways in which the boundary may be joined within the Lake, is included in the appendix hereto as exhibit D.

The Special Master has recommended that California

and Nevada be given an opportunity to determine by agreement "the point in Lake Tahoe where the north and south line ends and the oblique line begins . . . subject to approval of this Court, . . ." and in the absence of such agreement, that he be empowered to hold further hearings and make recommendations thereto. Special Master's Report 49–50. Inasmuch as the record before the Special Master in this phase of the proceeding has been closed and the boundary question is still an open one until this Court makes its decision, California and Nevada have not attempted to reach formal agreement respecting such an intersection. However, should this Court adopt the boundary recommendations of the Special Master, California respectfully urges that its judgment provide additionally that the Coast and Geodetic Survey line be extended northwesterly until it reaches that point of intersection in Lake Tahoe concerned with the north-south line projected across the Lake by Von Schmidt in 1873. Such a solution would ensure the stability of each state's presently exercised jurisdiction over the shores of the Lake and would avoid the necessity to make any unsightly dog-legs within the Lake which would create additional angles obviously not contemplated by the makers of either state's constitution.

With this direction from the court, the parties may proceed to fix the location of such point and provide a precise description which may be incorporated within the court's final judgment.

Accordingly, it is recommended that the boundary

between the states of California and Nevada be determined and established to be the line known as the Von Schmidt line from its beginning at the intersection of the 42nd parallel of north latitude on the Oregon border and the 120th degree of longitude west from Greenwich, each as established by Allexey W. Von Schmidt in 1872, and extending southerly along the 120th degree of longitude as marked and determined by Von Schmidt in 1872 and 1873 to the point in Lake Tahoe where such Von Schmidt line intersects the northwesterly prolongation of a straight line known as the United States Coast and Geodetic Survey line as established by it from 1893–1899; then running in a south-easterly direction along said prolongation, and along said straight line to the point where the 35th parallel of north latitude intersects the centerline of the Colorado River as determined by compacts between Arizona-Nevada and California-Arizona. See exh. D, *Supra.*

VII

ONCE THE BOUNDARY IS ESTABLISHED, THIS COURT SHOULD RETAIN JURISDICTION TO DETERMINE THE STATUS OF LANDS SELECTED BY NEVADA WITHIN THE TERRITORY OF CALIFORNIA

A. Thousands of acres of public lands were selected unlawfully by Nevada from within the territory of California

Although the boundaries were definitively set in 1873 (with respect to the north-south line) and 1899 (as to the

oblique) the General land Office and its successor, Bureau of Land Management, inexplicably delayed closing their public land surveys on the new lines. E.g., exhs. 210–215, 217–231. As a result, Nevada continued blithely to select and sell thousands of acres of public lands known to her to be within California, with the apparent approval and consent of the federal government. E.g., Nevada Surveyor General's Report of 1911, exh. 232.

The record in this proceeding shows erroneous selections (primarily of internal improvement lands) by Nevada within the State of California as follows:

1. *Prior to May 1, 1873*

Prior to May 1, 1873, the State of Nevada selected 2,138 acres from Lake Tahoe north that were within the State of California as its boundaries are delineated by the "Von Schmidt" line. Affidavit of Fred Sledd, exh. 238. Although most of this land was patented to private individuals, several parcels are still held by the State of Nevada. Exh. 209.

Although federal approval of these selections might have been justified by mistaken reliance on the "Houghton-Ives" line of 1863, the validity of these selections, and patents issued thereon, is in grave doubt. *Coffee* v. *Groover, supra,* 123 U.S. 1.

2. *After May 1, 1873*

Even more incomprehensible is the fact that the United States General Land Office and its successor, the Bureau of Land Management, continued to ratify and

approve selections by the State of Nevada within California as delineated by the Von Schmidt line (a line established and accepted by the United States May 1, 1873) after it had accepted the Von Schmidt line as the California-Nevada boundary. E.g., exhs. 209, 232; Defendant's Answers to Plaintiff's Second Set of Interrogatories 49, 50, with exhibits. From Lake Tahoe north to the Oregon border, some 1,484.60 acres were released by the United States without authority of law to the State of Nevada even though this land was located in the State of California by federal survey contracted for and accepted by the United States. Exhs. 209, 236, 237, 238.

Although our researches with respect to the boundary from Lake Tahoe southeasterly to the Colorado River are not completed, it is anticipated that similar findings will be made with respect to Nevada selections there. We have already discovered that some 2,000 acres of land directly south of Lake Tahoe were unlawfully selected by the State of Nevada with the approval of the United States. Exh. 237.

This situation will be exacerbated, of course, if as Nevada urges, a new survey is to be ordered from the point established by Daniel Major on the California-Oregon border. See defendant's counterclaim, count II. Plaintiff's researches of the California-Nevada selections indicate that if a "Major's line" were to be surveyed, the title to some 34,040 acres of land from Lake Tahoe to the Oregon border selected by California from the public domain or granted to her as school lands and approved by the General Land Office would be in question. Along

the border from Lake Tahoe southeasterly to the Colorado River, 13,894 acres would be similarly in jeopardy. Exhs. 209, 238.

Confusion runs rampant even today. The Department of Interior has taken the position, in a formal ruling, that school lands cleared to California but relocated within Nevada by a subsequent survey were, in effect, never school lands at all. E.g., *In re Pellkofer,* plaintiff's exh. 216. That the department is less then certain about its theory is evidenced by a communication from its Bureau of Land Management as late as November 1978, identifying a similar parcel and asking the California State Lands Commission its views with respect to its status. Exhs. 233, 234. Similar confusion exists with respect to a school land parcel confirmed to California by the Department of the Interior in 1910 and reconfirmed in 1960 even though the Bureau of Land Management granted a right of way over it to the Nevada Department of Highways in 1953. This parcel is recognized as California property by the assessor's office of Esmeralda County, Nevada, which is now threatening to sell it for nonpayment of taxes. Affidavit of F. D. Uzes, exh. H to Plaintiff's Motion to File Amended Complaint and to Bifurcate Issues.

B. Holdings of the United States Supreme Court and the Department of the Interior alike indicate that selections of public lands not made within the proper state are invalid and remain in the public domain

There is substantial authority to the effect that the selections and school land grants of Nevada within the

State of California and California within Nevada (as their boundaries were subsequently determined by the Von Schmidt survey north of Lake Tahoe and the U.S. Coast & Geodetic Survey south of that lake), may be invalid and therefore the land may still be within the public domain. The latest authority to this effect comes from the Department of the Interior itself in the form of *In re Pellkofer,* decision No. A-29832, August 29, 1968, exhibit 216 herein. In the *Pellkofer* case, applicant applied to the Bureau of Land Management for a right of way across what he alleged to be public domain situated in the State of Nevada. The bureau rejected the application on the ground that it lacked jurisdiction over that section because it had passed to California as school lands. The parcel in question was located in California by the Von Schmidt and Baker surveys of 1873 and 1884. However, when the oblique California-Nevada boundary was resurveyed by the U.S. Coast & Geodetic Survey, it was relocated on the Nevada side of the boundary. *Ibid.* On appeal, the Department of the Interior held that the lands in question had never passed to the State of California but remained in the public domain because of their subsequent location within Nevada. "Since the School Land Grant conveyed to California only the school sections within its boundaries, it follows, of course, that if this section 36 was not in California, as it was not, it did not pass to the state upon the acceptance on the plat survey." *Ibid.*

Of even greater concern are the earlier decisions of this Court with respect to the validity of grants made by

states of lands subsequently determined to be outside their boundaries. In *Coffee* v. *Groover, supra,* 123 U.S. at p. 1, this Court held that a patent issued by the State of Georgia under what was then mutually (but mistakenly) assumed by Georgia and Florida to be the interstate boundary was invalid, and that a subsequent Florida patent under a swamp and overflow lands grant derived from the United States prevailed. This Court flatly stated such grants are invalid if they are made beyond the territory of the grantor. *Id.,* at pp. 21–23. See also *Poole* v. *Fleeger* (1887) 36 U.S. (11 Peters) 185, holding that grants by states which, when made, were actually beyond the territorial boundary were unlawful even if a compact subsequently established that line as the lawful boundary.

C. The United States should be invited to intervene; if she declines to do so, she should be joined in this proceeding

California has repeatedly pointed out the significance of this proceeding to the Departments of Justice and Interior. At issue are the authority of the federal government to make interstate boundary surveys, the validity of United States clear-listings and patents made in reliance thereon and the effect of a federal administrative ruling which sheds doubt on the title to thousands of acres of land. Informal efforts to obtain the participation of the Department of the Interior have been fruitless. Communications from the California State Lands Commission, the California Attorney General, and virtually the entire California congressional delegation have met

with no response. Exhs. K–Q to Plaintiff's Motion to File Amended Complaint herein.

The interests of innccent purchasers as well as the states concerned requires that the status of titles be decided in this matter. Accordingly, California filed a motion requesting leave to file its second amended complaint to (1) add the United States as a necessary party; (2) obtain declaratory and quiet title relief with respect to (a) those parcels shown in record ownership of the State of California which are now apparently claimed by the United States to be the public lands in reliance upon subsequent surveys (e.g., *Pellkofer, supra*); (b) those parcels claimed by successors in interest of the State of California, represented by this State as parens patriae; and (c) those parcels within the State of California unlawfully granted to the State of Nevada; and (3) mandate the Secretary of the Interior to authorize selection by California of public domain lands within its borders to replace those that were unlawfully given Nevada. The Special Master has recommended that this motion be allowed. Special Master's Report 50.

The propriety of participation of the United States in a proceeding of this nature is well established. In *Texas* v. *Louisiana* (1972) 410 U.S. 702, it became apparent in the course of an interstate boundary dispute that the United States might have an interest in certain islands in the west half of the Sabine River. See Special Master's Report, *Texas* v. *Louisiana,* No. 36. Original, pp. 15–16 (Oct. Term, 1974). This Court thereupon invited the United States to participate in a second hearing for

determination of such interest. *Texas* v. *Louisiana, supra.*

Additional precedent for such appearance exists in *Florida* v. *Georgia* (1854) 58 U.S. (17 How.) 478. There, the United States Attorney General actively petitioned for leave to intervene in an interstate boundary dispute on grounds strikingly similar to those existing here:

1. The validity of federal patents to individuals were at stake. "Here is responsibility of (the United States) to its grantees." *Id.,* at p. 481.

2. ". . . [T]o see that the ease is fully and well tried, with all just defenses fully before the court . . . ." *Id.,* pp. 481–482.

3. "The United States have a general interest in the question of the boundaries of states, because of sundry political or legislative relations of the subject; as, for instance, apportionment of members of the house of representatives, collection districts, judicial districts, and many other things having reference to the boundaries of states." *Id.,* at p. 481.

4. As the states cannot change their boundaries by agreement without the consent of Congress, ". . . they ought not to be permitted to alter that boundary in the suit pending, either by possible mispleading, mistake in pleading, omission of pleading, or direct confession, or by omission of evidence . . . ." *Id.,* at p. 482.

Chief Justice Taney, writing for the majority, ruled that the United States should be permitted to intervene informally, inasmuch as it had a duty on behalf of the other states to examine into the subject, particularly

where a judgment in such action would bind the United States. *Id.,* at pp. 493, 494.

The United States could properly intervene as a plaintiff in this action. E.g., *United States* v. *Texas* (1950) 339 U.S. 707. Having refused to do so, it may be joined as a defendant. Fed. Rules Civ. Proc. 19(a). And this Court clearly may invite it to participate. See Special Master's Report 50. Such an invitation could be much more persuasive than were the fruitless pleas of California.

D. The court should proceed to determine the boundary issues and retain jurisdiction over the question of validity of California's and Nevada's selection of school lands and the possible federal interest therein

California is eager to avoid delay of the central issue of determination of the proper location of the California-Nevada boundary. It will not be necessary to delay such a decision because of the filing of a second amended complaint or because the United States is invited to express her views on the status of Nevada's lawless selections. Under similar circumstances, Justice Black pointed out that this Court could, after determining in general the ownership of an area, hold later hearings as necessary to determine the status of specific segments with more particularity. *United States* v. *California* (1947) 332 U.S. 19, 25–26. Indeed, ample precedent exists for such a procedure. In *Texas* v. *Louisiana, supra,* 410 U.S. at p. 714, this Court invited the United States to participate in a second hearing when it determined that there was a possible federal interest in certain lands. See Special Master's Report, *Texas* v.

Louisiana, No. 36, original, pp. 15–16 (Oct. Term, 1974). Determination of the initial boundary question will shape the character and nature of the issues raised in plaintiff's proposed second amended complaint. Abandonment of the case after such a determination would leave the rights of many innocent persons undetermined and lead to multiple litigation. Therefore, it is respectfully requested that this Court authorize the Special Master, as he suggests, to hold conferences and hearings as necessary to determine the interests of the United States, if any, and whether the United States should be made a party. Special Master's Report, Recommendation 5, p. 50. In the event such conferences and hearings indicate the necessity for filing a second amended complaint and joinder of the United States, an appropriate order can be entered.

CONCLUSION

In her amended answer and counterclaim and her briefs before the Special Master, Nevada eloquently describes the confusion and color of the early days of the far west. But none of the facts she sets forth justify moving the states' 106-year-old boundaries.

The alternatives suggested by Nevada are simple: The states authorized a survey in 1863, and it was completed —at least up to 103 or more miles south of Lake Tahoe. Readopt the Houghton-Ives line, urges Nevada. Recover the lost monuments and finish the survey abandoned south of Lake Tahoe over a hundred years ago. No matter that the Houghton-Ives line was replaced by a new

one in 1873—one on which the citizens of both states have relied in the conduct of their affair ever since. No matter that the Nevada Surveyor General welcomed the new Von Schmidt line on behalf of his state with the words "The boundaries of the state now seem to be permanent . . . ." Exh. 138.

If this first alternative will not do, urges Nevada, make a new survey, utilizing a meridian only partially in use at any time, and abandoned in the late nineteen hundreds. Resurrect the 43rd meridian west and survey it from the Oregon border to the Colorado River. This is the first time in history that this suggestion has been made. It was never even thought of in the early days when the border was unsettled and Nevada's Constitution was new. Why was it never proposed then? Could it be that, as Nevada's State Constitution suggests, Congress believed the 43rd west to be coterminous with the existing eastern boundary of California? And could that explain why California's relatively powerful congressional delegation failed to oppose an act of admission that it is now suggested, moved Nevada's line nearly three miles into California's territory?

If these theories will not do, resourcefulness leads our sister state to another. In 1868, Daniel Major in surveying the California-Oregon border, identified a point which he believed to be the intersection of the 120th meridian and the 42nd degree of latitude. Of course Major was a federal surveyor, but Nevada is willing to forego its constitutional objection to federal surveys in this instance. All we have to do, suggests Nevada, is to

begin at Major's point and make a new survey from Oregon to the Colorado. No matter here that Major's job was to survey the Oregon border, not the California-Nevada one. And it is only a slight embarrassment that when the General Land Office hired Allexey Von Schmidt to survey the line at issue, and instructed him to use Major's point, he diligently attempted to do so and found it to be inaccurate; whereupon his principals excused him from using this point and accepted his survey based on another placement of the 120th meridian.

Last, but not least, the existing oblique boundary line is objectionable to Nevada on additional grounds. Although this is a line both states recognized in fact and by statute (at least until last year, when Nevada repealed hers), it is suggested the Coast and Geodetic Survey's work was prompted by California's "dubious" motives, and the survey was unconstitutional. No matter that here Nevada gained some 256 square miles by that survey and that, once again, both states have recognized this line since its completion in 1899.

Nevada's answering brief represents an earnest and unabashed effort to assert every possible theory that could result in additional territory for that state. None of her theories, however, are supported by the facts or the law in this case.

We respectfully submit that the time has come to put this matter to rest. For 106 years in the north and 80 years in the south the states have respected the boundary marked on the ground between California and Nevada. Nevada's long-dormant desire for a verdant

segment of the Sierra Nevadas may be understandable but must be rejected. The Special Master's Report should be accepted.

Should this Court reject the presently observed lines, a readily available alternative exists for defining the interstate boundary—a new survey. For there is clearly only one interstate boundary—that set out in California's 1849 Constitution. And it would be a relatively simple matter today to fix it astronomically and to mark it on the ground.

Finally, the United States, the party responsible for the surveys now questioned and for authorizing the selections the validity of which has been placed in doubt by its own subsequent statutory constructions, should be invited to assist in cleaning up after a controversy so largely originating from its own actions and inactions. Only when the validity of Nevada's selections within California has been clarified will this case finally be at an end.

The ramifications of *California* v. *Nevada* on the status of border lands are far-reaching. If school lands and selections were in fact invalid because of erroneous placements of the boundary, these facts should be ascertained as soon as possible so that steps can be taken to protect innocent persons by legislative and administrative action. If, contrary to the Department of Interior's views, the later federal boundary surveys had no effect on prior grants, a ruling to that effect should be made at a later stage in this proceeding. The United States should be invited to participate in this proceeding and jurisdiction

should be retained for a later determination of federal as against state and private interests in the affected border lands.

Respectfully submitted,

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State of California

CALIFORNIA BOUNDARIES AS SET FORTH IN THE CONSTITUTION OF 1849

EXHIBIT A

LINES AT ISSUE IN VICINITY OF 42° NORTH LATITUDE

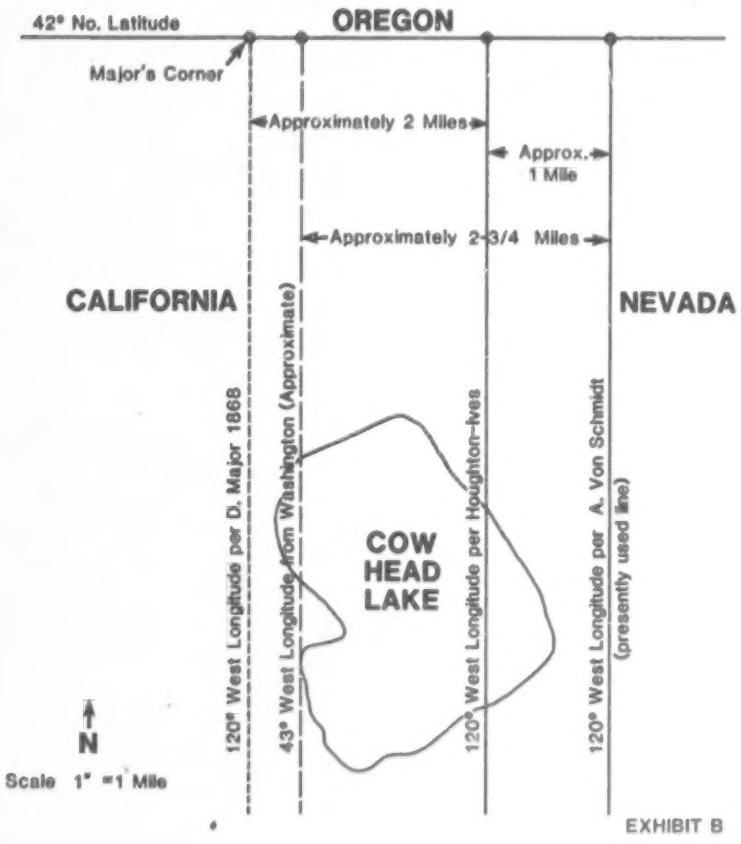

EXHIBIT B

OBLIQUE LINES AT ISSUE AT LAKE TAHOE

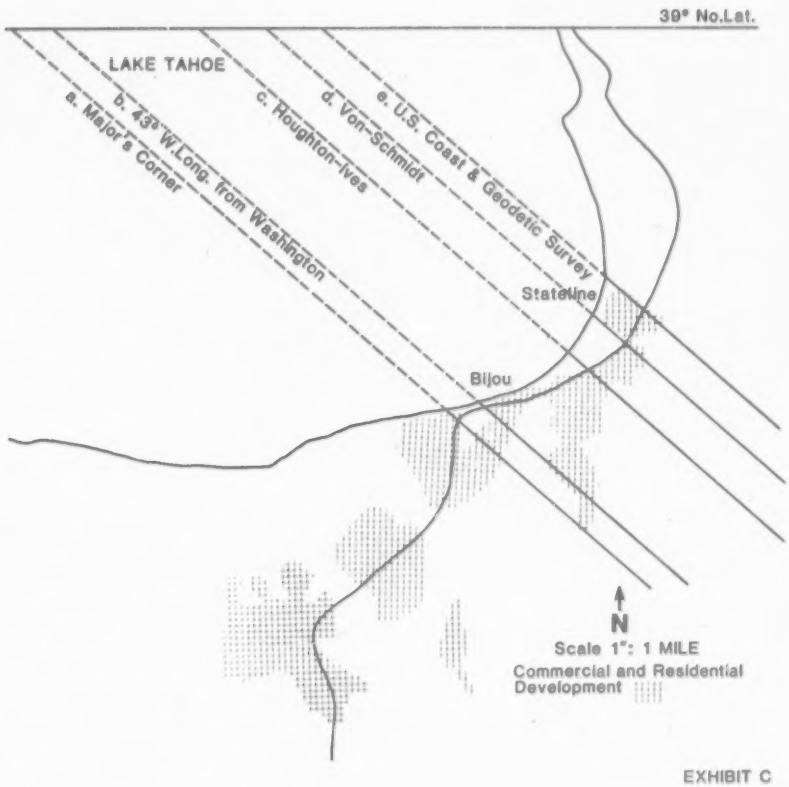

EXHIBIT C

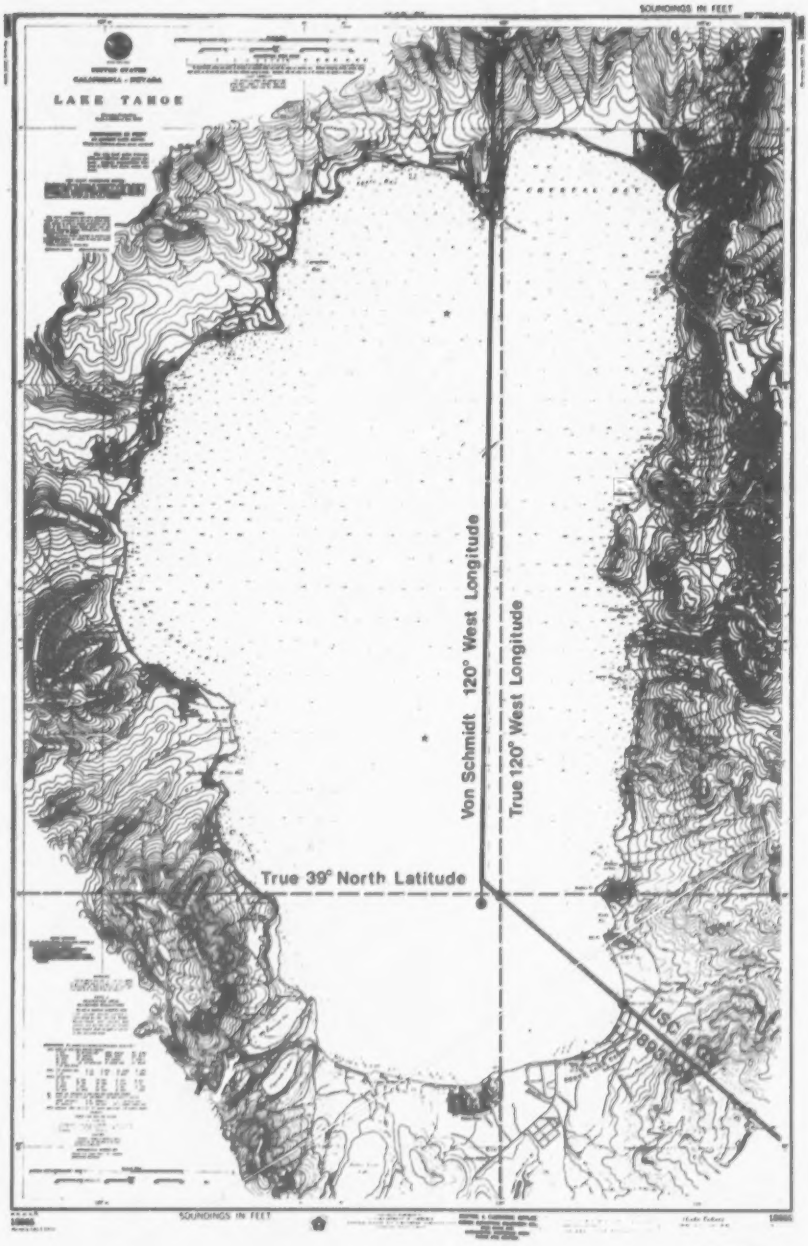
SOUNDINGS IN FEET
LAKE TAHOE
Von Schmidt 120° West Longitude
True 120° West Longitude
True 39° North Latitude
U.S. Route 50
SOUNDINGS IN FEET

EXHIBIT D

Supreme Court, U. S.
FILED
DEC 13 1979
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

NEVADA'S EXCEPTIONS TO REPORT OF SPECIAL MASTER AND BRIEF

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1. Although the Special Master recognized this Court's decisions approving in accurately-surveyed boundaries being observed by two states, he rejected the Houghton-Ives Survey as not being a complete survey in the face of uncontradicted evidence that the Houghton-Ives Survey was a complete survey of the 120th Meridian between the 39th and 42nd Parallels. 18

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HAS RECOMMENDED AN OBLIQUE LINE FROM THE POINT OF CONNECTION OF VON SCHMIDT'S MERIDIONAL LINE WITH HIS 39TH PARALLEL, OR A CONNECTION WITH THE 39TH PARALLEL AS LOCATED BY THE COAST & GEODETIC SURVEY; AND IF HE HAS RECOMMENDED THE LATTER, THEN IT IS AN OBLIQUE LINE WHICH HAS NEVER BEEN SURVEYED AND WOULD NOT INTERSECT THE COAST & GEODETIC SURVEY UNTIL IT REACHED THE COLORADO RIVER 43

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 73, Original

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Plaintiff,

v.

STATE OF NEVADA,

Defendant.

NEVADA'S EXCEPTIONS TO REPORT OF SPECIAL MASTER AND BRIEF

EXCEPTIONS TO REPORT OF SPECIAL MASTER

I.

NEVADA TAKES EXCEPTION TO THE SPECIAL MASTER'S FAILURE TO ADDRESS THE ISSUES OF (1) WHETHER CALIFORNIA AND NEVADA COULD, WITHOUT THE CONSENT OF CONGRESS, JOINTLY SURVEY, MARK ON THE GROUND, AND POST THEIR PREVIOUSLY UNSURVEYED BOUNDARY; AND (2) WHETHER THE CONSTITUTION VESTED IN THE UNITED STATES THE POWER TO RELOCATE THE

POSTED OBLIQUE BOUNDARY LINE AS SURVEYED BY VON SCHMIDT IN 1873 OVER TO THE LINE SURVEYED BY THE COAST & GEODETIC SURVEY IN 1893-99.

II.

NEVADA EXCEPTS TO THAT PART OF THE SPECIAL MASTER'S REPORT IN WHICH HIS RECOMMENDATION OF VON SCHMIDT'S 1872 SURVEY AS THE MERIDIONAL BOUNDARY AND THE COAST & GEODETIC SURVEY OF 1893-99 AS THE OBLIQUE BOUNDARY IS BASED UPON ACQUIESCENCE AND PRESCRIPTION BECAUSE ASSUMING, *ARGUENDO*, THAT THE JOINT-STATE HOUGHTON-IVES POSTED BOUNDARY WAS NOT THE OFFICIAL BOUNDARY, AND ASSUMING, *ARGUENDO*, THAT THE UNITED STATES WAS AUTHORIZED BY THE CONSTITUTION TO RELOCATE THE OBLIQUE BOUNDARY FROM VON SCHMIDT'S SURVEY OF 1873 OVER TO THE SURVEY BY THE COAST & GEODETIC SURVEY IN 1899, THEN THE DOCTRINE OF ACQUIESCENCE AND PRESCRIPTION WOULD HAVE NO APPLICATION WHATSOEVER SINCE THE UNITED STATES WOULD HAVE BEEN AUTHORIZED BY THE CONSTITUTION TO ESTABLISH THE BOUNDARY AS AN INITIAL MATTER IN 1872 AND THEREAFTER RELOCATE A PORTION OF IT AND NOTHING WOULD BE REQUIRED OF EITHER STATE TO

VALIDATE AN EXERCISE BY THE UNITED STATES OF A POWER CONFERRED BY THE CONSTITUTION.

III.

NEVADA EXCEPTS TO THE SPECIAL MASTER'S RECOMMENDATION OF THE VON SCHMIDT SURVEY OF THE 120TH MERIDIAN AS THE MERIDIONAL LINE OF BOUNDARY BECAUSE:

A. HIS CONCLUSION THAT THE JOINT-STATE HOUGHTON-IVES SURVEY OF 1863-65 DID NOT ESTABLISH THE "TRUE AND ANCIENT BOUNDARY" BETWEEN CALIFORNIA AND NEVADA IS UNSUPPORTED BY THE EVIDENTIARY RECORD FOR THE FOLLOWING REASONS:

1. Although the Special Master recognized this Court's decisions approving inaccurately-surveyed boundaries being observed by two states, he rejected the Houghton-Ives Survey as being not a complete survey in the face of uncontradicted evidence that the Houghton-Ives Survey was a complete survey of the 120th Meridian between the 39th and 42nd Parallels.

2. The Special Master's conclusion that the General Land Office did not officially recognize the Houghton-Ives Survey is contrary to substantial and

uncontradicted evidence of recognition of, and acquiescence therein, by the Congress, the Secretary of Interior, the General Land Office, and the Census Bureau.

3. The Special Master failed to recognize the substantial and uncontradicted evidence that Houghton-Ives Survey was the first practical location of California's and Nevada's boundary and that the survey did not take effect "as an alienation of territory, but as a definition of the true and ancient boundary."

B. HIS CONCLUSION THAT THE UNITED STATES DID NOT, BY VON SCHMIDT'S SURVEY OF 1872-73, MOVE OR RELOCATE THE POSTED AND SUBSISTING BOUNDARY LINE BEING OBSERVED BY CALIFORNIA AND NEVADA SINCE 1863 IS UNSUPPORTED BY THE EVIDENTIARY RECORD FOR THE FOLLOWING REASONS:

1. The reasons urged under Exception No. III A.

2. Contrary to the Special Master's finding, the uncontradicted evidence shows the Von Schmidt Survey did take effect as "an alienation of territory" of Nevada and was not "a definition of the true and ancient boundary" in that

Nevada lost territorial sovereignty and jurisdiction over several hundred square miles of her territory.

3. The Special Master's conclusion that the purpose of the Von Schmidt Survey was to establish the boundary to resolve an inherent conflict in location of meridian is contrary to the uncontradicted and substantial evidence that there was no dispute between California and Nevada regarding their line of boundary.

IV.

NEVADA EXCEPTS TO THAT PART OF THE SPECIAL MASTER'S REPORT WHEREIN HE RECOMMENDS THE COAST & GEODETIC SURVEY OF 1893-99 AS THE OBLIQUE BOUNDARY BETWEEN CALIFORNIA AND NEVADA FOR THE FOLLOWING REASONS:

A. THE SPECIAL MASTER JUSTIFIES THE NECESSITY OF A RESURVEY OF THE OBLIQUE BOUNDARY BECAUSE VON SCHMIDT'S OBLIQUE SURVEY WAS NOT AN ACCURATE SURVEY, WHICH IS CONTRARY TO THE SPECIAL MASTER'S OWN RECOGNITION OF THE DECISIONS OF THIS COURT APPROVING INACCURATELY-SURVEYED BOUNDARIES BEING OBSERVED BY TWO STATES.

THE SPECIAL MASTER'S CONCLUSION THAT THE VON SCHMIDT SURVEY, NOTWITHSTANDING EVIDENCE OF MANY INACCURACIES, WAS EFFECTIVE TO ESTABLISH THE NORTH-SOUTH MERIDIONAL LINE IS INCONSISTENT WITH THE SPECIAL MASTER'S CONCLUSION THAT VON SCHMIDT'S SURVEY DID NOT ESTABLISH THE OBLIQUE PORTION BECAUSE IT WAS NOT AN ACCURATE SURVEY AND THEREFORE WAS IN NEED OF A RESURVEY.

B. CONTRARY TO THE SPECIAL MASTER'S FINDING, THE UNCONTRADICTED EVIDENCE SHOWS THE COAST & GEODETIC SURVEY DID TAKE EFFECT AS "AN ALIENATION OF TERRITORY" OF BOTH CALIFORNIA AND NEVADA, AND THAT IT WAS NOT "A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY" IN THAT CALIFORNIA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 321 SQUARE MILES AND NEVADA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 65 SQUARE MILES.

V.

NEVADA EXCEPTS TO THAT PART OF THE SPECIAL MASTER'S REPORT IN WHICH HE CONCLUDES THAT "IN THE ESTABLISHMENT OF

NEVADA'S BOUNDARY IT WAS BELIEVED THAT THE 43RD MERIDIAN WEST FROM WASHINGTON AND THE 120TH MERIDIAN WEST FROM GREENWICH WERE THE SAME" BECAUSE IT IGNORES CONGRESS' OWN 1850 REPORT ON THE ESTABLISHMENT OF AN AMERICAN PRIME MERIDIAN.

VI.

NEVADA EXCEPTS TO THE SPECIAL MASTER'S REPORT FOR ITS FAILURE TO RECOMMEND A BOUNDARY LINE WHICH WOULD BE A FINAL LINE SINCE THE VON SCHMIDT MERIDIONAL LINE AND THE COAST & GEODETIC SURVEY OBLIQUE LINE WERE SURVEYED BY THE UNITED STATES IN THE ABSENCE OF ANY DISPUTE WHATSOEVER BETWEEN CALIFORNIA AND NEVADA OVER THEIR BOUNDARY AND, THERE FORE, IF THE SPECIAL MASTER'S CONCLUSION THAT THE UNITED STATES MAY RE-ESTABLISH A STATE'S BOUNDARY IN THE ABSENCE OF THE TWO STATES DISPUTING THE LOCATION OF THEIR BOUNDARY IS CONFIRMED BY THIS COURT, THE UNITED STATES IS FREE TO RE-ESTABLISH THE BOUNDARY ON ANOTHER LOCATION IN THE FUTURE; AND THERE WOULD BE GRAFTED ONTO THE CONSTITUTION A NEW MEANS OF CHANGING A STATE'S BOUNDARY, INDEPENDENT OF THE CONSTITUTION'S PRESENT REQUIREMENT THAT THERE BE A DISPUTED BOUNDARY RESOLVED UNDER THE COMPACT CLAUSE, OR

SETTLED BY A DECREE PURSUANT TO THIS COURT'S ORIGINAL JURISDICTION, THAT IS, THE EXECUTIVE OR CONGRESS WOULD BE EMPOWERED TO CHANGE A STATE'S BOUNDARY WHENEVER EITHER DEEMS SUCH DESIRABLE.

VII.

NEVADA TAKES FURTHER EXCEPTION TO THE FIRST RECOMMENDATION IN THAT IT IS UNCLEAR WHETHER: (1) THE SPECIAL MASTER IS RECOMMENDING A CONNECTION MADE BY HIM OF VON SCHMIDT'S MERIDIONAL LINE WITH AN EXTENSION OF THE COAST & GEODETIC OBLIQUE LINE AT A 39TH PARALLEL WHICH IS NOT THE 39TH PARALLEL AS LOCATED BY VON SCHMIDT NOR THE 39TH PARALLEL AS LOCATED BY THE COAST & GEODETIC SURVEY, IN WHICH CASE THE SPECIAL MASTER HAS MADE THE CONNECTION FOR THE PARTY STATES "AT A POINT APPROXIMATELY AT SUCH INTERSECTION" AND THEREFORE HIS SUGGESTED COURSE OF ACTION IN HIS SECOND RECOMMENDATION IS UNNECESSARY; OR (2) WHETHER THE SPECIAL MASTER HAS RECOMMENDED AN OBLIQUE LINE FROM THE POINT OF CONNECTION WITH VON SCHMIDT'S 39TH PARALLEL, OR A CONNECTION WITH THE COAST & GEODETIC'S 39TH PARALLEL, AND IF THE LATTER, THEN IT IS AN OBLIQUE LINE WHICH HAS NEVER BEEN SURVEYED AND WOULD NOT

INTERSECT THE COAST & GEODETIC OBLIQUE LINE UNTIL IT REACHED THE COLORADO RIVER.

VIII.

NEVADA TAKES EXCEPTION TO THE SPECIAL MASTER'S THIRD AND SEVENTH RECOMMENDATIONS TO THE EXTENT THAT BOTH RECOMMENDATIONS MAY BE READ AS IMPLYING THAT THERE IS A NEED TO MARK EITHER OF THE RECOMMENDED LINES ON THE GROUND BECAUSE NEVADA BELIEVES THE LINES ARE ADEQUATELY MARKED NOW AND THE EXPENSE OF ANY RETRACEMENT, MARKING OR POSTING, SHOULD BE BORNE BY THE UNITED STATES SINCE THE UNITED STATES CAUSED BOTH LINES TO BE SURVEYED.

ARGUMENT

I.

THE SPECIAL MASTER SHOULD HAVE ADDRESSED THE ISSUES OF (1) WHETHER CALIFORNIA AND NEVADA COULD, WITHOUT THE CONSENT OF CONGRESS, JOINTLY SURVEY, MARK ON THE GROUND, AND POST THEIR UNSURVEYED BOUNDARY; AND (2) WHETHER THE CONSTITUTION VESTS IN THE UNITED STATES THE POWER TO RELOCATE THE POSTED OBLIQUE BOUNDARY LINE AS SURVEYED BY VON SCHMIDT IN 1873 OVER TO THE LINE SURVEYED BY THE COAST & GEODETIC SURVEY IN 1893-99.

From the beginning of this litigation Nevada has insisted that this is a boundary case of first impression. California and Nevada were peacefully observing a boundary which both had jointly surveyed and marked in 1863 in settlement of a dispute over its location, which had culminated in a pitched battle with loss of life and wounded. This happy state of settled boundary was abruptly changed in 1872-73 by the unilateral actions of the United States in moving the boundary over to the line of Von Schmidt's Survey.

Nevada has contended this was a taking of a part of her territory and placing it within California and that such was neither sanctioned by the Constitution then, nor "constitutionalized" by the passage of time.

Nevada therefore sought to raise an issue which would establish whether the joint-state survey had any constitutional basis, and whether an unconstitutional taking of Nevada's territory did occur. That issue as raised: "Does the Constitution permit two states jointly to mark on the ground, as an initial matter, the line of their common boundary prescribed by Congress and adopt the joint line as their boundary?" (Nev. Ans. Br. p. 62).

Nevada also argued alternatively that if the joint-state survey did not establish the line of boundary, then the United States established the boundary by either having set Major's and Lieut. Ives' terminal points, or by Von Schmidt's Survey on the ground of the entire boundary. The United States thereafter relocated the line of oblique boundary from Von Schmidt's 1873 line over to the line surveyed in 1899 by the U. S. Coast & Geodetic survey, and Nevada contended that this relocation was an unconstitutional exchange of significant territory of California and Nevada and raised the issue of whether the Constitution authorized the United States to relocate Von Schmidt's oblique line then marking the boundary between the states.

California consistently avoided coming to grips with both issues. Instead, in her opening brief California sought to persuade the Special Master to view this as a typical case of boundry dispute to be resolved by the doctrine of acquiescence and prescription so often applied by this Court in past boundary disputes—ignoring the distinguishing feature that in no previous case has this Court addressed the question of whether

the United States could unilaterally move the posted boundary line being observed by two states.

California, in her Reply Brief, shifted to new ground and argued that the joint-state Houghton-Ives Line and Von Schmidt's oblique line were "defective and uncertain and thus not permanently established."[1]

It seems California has succeeded even beyond her expectations for the Special Master declined to venture onto this ground of whether a state can "constitutionalize" by her acquiescence an usurped power. The Special Master adopted both of California's positions: (1) that this is a simple boundary dispute calling for application of the doctrine of acquiescence and prescription; and (2) that the Houghton-Ives and Von Schmidt oblique surveys were not accurate nor complete and therefore are to be disregarded.

As will be seen from the argument under Exception II, if the Special Master had addressed these initial issues raised by Nevada, then regardless of his conclusions thereon, it would not have been necessary for the Special Master to rely upon acquiescence and prescription for his recommended line of boundary. The Special Master therefore has needlessly, and wrongly, applied the doctrine of acquiescence and prescription far beyond its application by this Court in the past.

As traditionally applied, acquiescence has had as its

[1]California's argument, and the Special Master's agreement therewith, do however have the merit of inherently conceding that the Federal Government would not have any authority to move or relocate a state boundary which has been marked, posted and established on the ground.

underpinnings a claim of right, a color of title, in the disputing states. This assertion of right was first announced in *Rhode Island v. Massachusetts,* 12 Pet. (37 U.S.), at 733, wherein it was held: "[T]he only question is, to which the territory belongs. This must depend on the right by which each state claims, the territory in question." Careful analysis of later cases of disputed boundary similarly disclose that in each the doctrine of long acquiescence by another state has been applied when the state's possession was under a claim of right or color of title.

California's supposed claim of right in the case *sub judice* is the unconstitutional gift of Nevada's territory by the United States. California has never asserted under any claim of right. It was and still is the United States which asserts and maintains the Von Schmidt meridional line and the Coast & Geodetic oblique line as the boundary between the two states. California's claim of right or color of title to the disputed land is only as good as the title in her donor, the United States. *Mayor of New Orleans v. United States,* 10 Pet. (35 U.S.) 662, at 731. There is no constitutional authority by which the United States could acquire the title, municipal sovereignty and jurisdiction over the territory of a state after its coming into the Union sufficient to divest the state of her sovereignty and jurisdiction. *Pollard v. Hagan,* 3 How. (44 U.S.) 212, 223.

II.

THE SPECIAL MASTER WRONGLY BASED HIS RECOMMENDED BOUNDARY LINE UPON

ACQUIESCENCE AND PRESCRIPTION BECAUSE ASSUMING, *ARGUENDO,* THAT THE JOINT-STATE SURVEY DID NOT ESTABLISH THE OFFICIAL BOUNDARY, AND ASSUMING, *ARGUENDO,* THAT THE UNITED STATES WAS AUTHORIZED BY THE CONSTITUTION TO RELOCATE THE OBLIQUE BOUNDARY OVER TO THE LINE SURVEYED BY THE COAST & GEODETIC SURVEY, THEN ACQUIESCENCE AND PRESCRIPTION WOULD HAVE NO APPLICATION SINCE THE UNITED STATES WOULD HAVE ESTABLISHED THE BOUNDARY AS AN INITIAL MATTER IN 1872-73 AND THEREAFTER RELOCATE THE OBLIQUE PORTION, AND NOTHING WOULD BE REQUIRED OF EITHER STATE TO VALIDATE AN EXERCISE BY THE UNITED STATES OF A POWER CONFERRED BY THE CONSTITUTION.

If the Special Master had addressed these two issues raised by Nevada, supra, p. 11, and assuming, *arguendo,* that he would have found that the two states did not have constitutional authority to establish on the ground the boundary between them, then the Special Master would have laid the predicate for the constitutional necessity that the United States establish the boundary.

Instead, the Special Master concluded that the Houghton-Ives Survey was not a complete survey and not officially recognized by the General Land Office. The Special Master then concluded that the purpose of Von Schmidt's Survey was not to move the posted

boundary, but its purpose was to resolve a conflict in the 120th Meridian's location even though the then posted boundary was in fact physically moved over to the line of Von Schmidt's Survey.

If the Special Master is correct in his conclusion that the United States did establish the boundary by authority of Von Schmidt's Survey, then the Special Master must have been of the opinion that the United States established it pursuant to some constitutional power. However, the Special Master fails to set forth in his Report that the action of Congress in authorizing the survey performed by Von Schmidt was in pursuance of constitutional authority. Assuming, *arguendo,* that the Von Schmidt Survey was a constitutional survey, then it follows that whether California or Nevada consented thereto, or by their inaction or acquiescence therein, matters not one whit. The actions of the United States, if constitutional, would have been complete and effective in 1872 when exercised. Nothing would have been required of either state to render action taken under the Constitution efficacious—least of all, the consent or lengthy acquiescence of the two states—the consent of the required number of states having been given at the Constitution's adoption in 1789.

It is the same with the relocation by the United States of the oblique boundary from Von Schmidt's oblique line to the line surveyed in 1893-99 by the Coast & Geodetic Survey. If this relocation were done pursuant to constitutional warrant, then it was effective and established the new oblique boundary when

done. Again, nothing was required of either California or Nevada to validate the exercise of a constitutional power by the United States.

The Supreme Court long ago rejected any notion of a supposed power in a single State to alter the Constitution by conferring an absent power. Chief Justice Marshall in rebutting a similar argument advanced in *McCulloch vs. Maryland,* 4 Wheat. (17 U.S.) 316,429, emphatically declared:

> These powers [of the United States] are not given by the people of a single state. They are given by the people of the United States . . . Consequently, the people of a single state cannot confer a sovereignty which will extend over [the people of the United States] . . . because it is the usurpation of a power which the people of a single state cannot give.

Also, in *Pollard v. Hagan,* supra, at 223, this Court denied any power in a state to confer upon Congress a municipal jurisdiction over her territory. This Court said in *Pennsylvania v. Wheeling Bridge Co.,* 18 How. (59 U.S.) 421, at 433, that an interstate compact clearly did not operate as a restriction upon the power of Congress to regulate commerce as "Otherwise, Congress and two states would possess the power to modify and alter the Constitution itself." Further, in *Coyle v. Smith,* 221 U.S. 559, at 567, it was held that a state could not agree to conditions of admission or otherwise the power of Congress would be enlarged.

Yet, having laid the predicate for constitutionalizing Von Schmidt's Survey, the Special Master does not do so, but rather, embraces the doctrine of

acquiescence and prescription as justification for recommending Von Schmidt's Survey of the 120th Meridian and the Coast & Geodetic Survey's oblique line.

Nevada understands the Special Master's Report as saying that it matters not under what authority or lack of authority the United States surveys states' boundaries; that it is sufficient that the states' inaction and acquiescence validates it. Nevada submits that this is a frightful premise and portends ill for the Constitution if extended to the limits of an assumed logic.

Therefore, if the Von Schmidt Survey and the Coast & Geodetic survey were done in accordance with the Constitution, then the consent of a state or her acquiescence through silence and passage of time is of no consequence. But, if the Von Schmidt and Coast & Geodetic surveys were conducted without constitutional authority, then neither Nevada's nor California's acquiescence therein could constitutionalize them. *McCulloch v. Maryland, Pollard v. Hagan, Pennsylvania v. Wheeling Bridge Co., Coyle v. Smith,* supra.

Nevada respectfully urges this Court, if it is disposed to decree Von Schmidt's location of the 120th Meridian as California and Nevada's Meridional Boundary, as the Special Master recommends, that the Court clearly set forth in the Decree the constitutional basis for it being decreed the Meridional Boundary, that is, that the United States through Congress was empowered under the Constitution to establish the boundary in 1872-73 and negate any pretension that the United States' conduct of Von Schmidt's Survey is today efficacious because of Nevada's and California's inaction and acquiescence therein. Similarly, if the Court is disposed to adopt the Special Master's recommendation of the Coast & Geodetic Survey's oblique line, then the Decree

should clearly indicate that the Coast & Geodetic Survey was performed pursuant to some constitutional power.

III.

THE SPECIAL MASTER'S RECOMMENDATION OF VON SCHMIDT'S SURVEY OF THE 120TH MERIDIAN AS THE MERIDIONAL BOUNDARY SHOULD NOT BE ACCEPTED BECAUSE:

A. HIS CONCLUSION THAT THE JOINT-STATE HOUGHTON-IVES SURVEY OF 1863-65 DID NOT ESTABLISH THE "TRUE AND ANCIENT BOUNDARY" BETWEEN CALIFORNIA AND NEVADA IS NOT SUPPORTED BY THE EVIDENCE FOR THE FOLLOWING REASONS:

1. ALTHOUGH THE SPECIAL MASTER RECOGNIZED THIS COURT'S DECISIONS APPROVING INACCURATELY-SURVEYED BOUNDARIES BEING OBSERVED BY TWO STATES, HE REJECTED THE HOUGHTON-IVES SURVEY AS NOT BEING A COMPLETE SURVEY IN THE FACE OF UNCONTRADICTED EVIDENCE THAT THE HOUGHTON-IVES SURVEY WAS A COMPLETE SURVEY OF THE 120TH MERIDIAN BETWEEN THE 39TH AND 42ND PARALLELS.

The Special Master summarily dismissed the 1863-65 joint-state Houghton-Ives Survey as "never a complete survey" (Report, p. 46). Presumably, the Special Master's conclusion rests upon the fact that the joint-state survey never extended to the 35th Parallel at the Colorado River. It should be noted that at

the time of the survey, Nevada's boundary with California did not extend to the Colorado River but extended only to the 37th Parallel (Exhibits 21, M). Indeed, the Special Master ignored evidence that Lawson acted as a commissioner for both states when he extended the Houghton-Ives Line an additional 73 miles to a point near the 37th Parallel (Exhibits 64, DDD, plate after p. 266).

In any event, the Special Master overlooked the obvious, that is, the Houghton-Ives Survey was a complete survey of the 120th Meridian from the 39th Parallel in Lake Tahoe north to the Oregon Line at the 42nd Parallel. It is difficult for Nevada to comprehend the Special Master's treatment of the Houghton-Ives Survey as not complete when he is not similarly troubled by the fact that the Coast & Geodetic Survey was not complete in the sense that it was not a complete survey of the entire boundary north to the 42nd Parallel but terminated at the 39th Parallel in Lake Tahoe.

2. THE SPECIAL MASTER'S CONCLUSION THAT THE GENERAL LAND OFFICE DID NOT OFFICIALLY RECOGNIZE THE HOUGHTON-IVES LINE IS CONTRARY TO SUBSTANTIAL AND UNCONTRADICTED EVIDENCE OF RECOGNITION AND ADOPTION OF THE HOUGHTON-IVES SURVEY BY THE CONGRESS, THE SECRETARY OF INTERIOR, THE GENERAL LAND OFFICE AND THE CENSUS BUREAU.

The Special Master's conclusion that the General Land Office did not officially recognize the joint-state surveyed line not only has no support in the record

but is contrary to substantial evidence that the United States Government recognized the Houghton-Ives Line to the fullest extent possible.

One of the main reasons which prompted California's Governor Leland Stanford to seek a joint-survey was to establish whether the important mining town of Aurora was in California or Nevada (Exhibit 59). As the Special Master noted Aurora was found to lie within Nevada. (Report, p. 19). But the Special Master stopped here. He did not comment on the many instances of recognition by the United States of the Houghton-Ives Line.

The following instances of recognition are in evidence. In June of 1868 Congress recognized Aurora to be within Nevada by declaring Aurora to be the seat of the General Land Office for the Nevada Surveying District (Exhibit MM). The United States Surveyor General for California requested the Governors of California and the Nevada Territory for data on the Houghton-Ives Survey and maps of it in order to adopt the work and close the public surveys thereon (Exhibits 90, 91, FFF). The General Land Office actually surveyed public lands along the Houghton-Ives Line and closed the public surveys thereon, both along the meridional and oblique portions (Exhibits Series FFFF illustrating closures of six townships north of Lake Tahoe). The United States, by its Secretary of Interior, "clear-listed" and conveyed to Nevada and California thousands of acres in reliance upon the Houghton-Ives Boundary Line (Exhibits 236, 237, 238, EEEE Series). The United States patented lands to private settlers with reference to Houghton-Ives

Boundary Line (Exhibit FFFF Series, BLM Historical Index Sheets). The General Land Office prepared annual official maps to accompany the Secretary of Interior's annual reports to Congress which showed closure of the public lands surveys, townships, and standard parallels on the Houghton-Ives Boundary Line (Exhibits ZZZZ, AAAAA).

This Court in *Louisiana v. Mississippi,* 202 U.S. 1, placed great reliance, when rejecting Mississippi's claim of boundary, upon Louisiana's selection, and approval by the General Land Office, of the public lands:

> "The lands in these townships were surveyed by the government * * * as being in and forming a part of the state of Louisiana. By the swamp land grants * * * the United States granted to [Louisiana] the swamp and overflowed lands within [her] respective limits, * * * Louisiana made application to the United States for the approval to her of these lands as being part of her territory and situated within her limits. * * *
>
> "[T]hese lands were approved to Louisiana by the Commissioner of the General Land Office * * * as forming part of that state, and they were subsequently patented, sold, and conveyed to various individuals, the chain of title extending from 1852 * * *.
>
> "When, as we have said, Louisiana, in the year 1852, selected these and other lands within her state limits as inuring to her under the swamp land grants, the General Land Office, on May 6, 1852, recognized the correctness of the claim to the lands and approved and patented them to her as a state." (at pp. 54-56)

Other acts of recognition by United States includes the Ninth Census in 1870 which reported the Town of Crystal Peak, which lay west of Verdi, to be within Nevada (Exhibit LL). The United States Army Engineers, through the setting of a stone monument in 1868 on the Houghton-Ives Boundary Line by Lt. Col. R. S. Williamson, recognized that line as the boundary (Exhibits 123, 124, S, p. 14) (Uzes' Testimony, Tr. p. 75). In 1872, George Davidson of the United States Coast Survey used the Houghton-Ives and Williamson stone monuments as triangulation points in determining his location of the 120th Meridian and Davidson did not set a monument to mark his determination of the 120th Meridian. (Exhibits 118 through 125) (Uzes' Testimony, Tr. pp. 75, 76).

Further, at the time of Nevada's admission into the Union, the Houghton-Ives line had been adopted by statute by California as her eastern boundary with the Nevada Territory. Knowledge by Congress of the boundaries of a state upon admission may be reasonably presumed. *Virginia v. Tennessee,* 148 U.S. 503, 521. There is a Congressional purpose to adopt whatever boundary a Territory had immediately prior to its admission as a state, *New Mexico v. Colorado,* 267 U.S. 30, where it was held the location of the boundary was fixed by the event of admission in accordance with a survey of the 37th Parallel which had therefore been made, even though it might not have been a correct survey.

Needless to say, when viewed against this array of actual recognition and adoption by the United States Government of the Houghton-Ives Survey as the

boundary line between California and Nevada, the Special Master's finding of no official recognition by the General Land Office is lacking any support in the record. On the contrary, the evidence clearly supports a finding that the United States did give the joint-state Houghton-Ives Line official recognition as the legal boundary between California and Nevada.

3. THE SPECIAL MASTER FAILED TO RECOGNIZE THE SUBSTANTIAL AND UNCONTRADICTED EVIDENCE THAT THE HOUGHTON-IVES SURVEY WAS THE FIRST PRACTICAL LOCATION OF CALIFORNIA'S AND NEVADA'S BOUNDARY, AND THAT THE SURVEY DID NOT TAKE EFFECT "AS AN ALIENATION OF TERRITORY, BUT AS A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY."

The Special Master's conclusion that neither the Von Schmidt or the Coast & Geodetic Surveys effected an alienation of the territory of either state (Report, p. 47) shows clearly that the Special Master overlooked substantial evidence that the Hougton-Ives survey was the first "practical location" on the ground of the disputed boundary, and being marked for the first time, neither California nor Nevada gained or lost any territory. *Virginia v. Tennessee.* supra, 520.

If the Special Master's conclusion can be read as proceeding from an undisclosed finding that the Houghton-Ives survey did take effect as an alienation of territory but failed for lack of consent of Congress, then surely the United States' actions just recounted amply demonstrate an affirmative recognition by the

United States of the joint-state boundary survey. Congress may give the required consent both impliedly and subsequently. *Virginia v. Tennessee,* supra, p. 522. Nor could Congress have lawfully withdrawn its consent thus impliedly given. See *Tobin v. United States,* 306 F.2d 270, at 274, where the court reasoned that "*** a line marking the boundary between two states initially drawn by such states acting pursuant to an interstate compact, could hardly be erased at some later date by Congress' enactment of hindsight legislation purporting to repeal its consent by which such boundary was initially determined."

B. THE CONCLUSION THAT THE UNITED STATES DID NOT, BY VON SCHMIDT'S SURVEY, MOVE OR RELOCATE THE POSTED AND SUBSISTING BOUNDARY LINE BEING OBSERVED BY CALIFORNIA AND NEVADA SINCE 1863 IS NOT SUPPORTED BY THE EVIDENCE FOR THE FOLLOWING REASONS:

1. FOR ALL OF THE REASONS SET FORTH IN THE ARGUMENT UNDER III A.

2. CONTRARY TO THE SPECIAL MASTER'S FINDING, THE UNCONTRADICTED EVIDENCE SHOWS THE VON SCHMIDT SURVEY DID TAKE EFFECT AS AN "ALIENATION OF TERRITORY" OF NEVADA AND WAS NOT "A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY" IN THAT NEVADA LOST SOVEREIGNTY AND JURISDICTION OVER SEVERAL HUNDRED SQUARE MILES OF HER TERRITORY.

The Special Master's conclusion that Von Schmidt's Survey did not alienate the territory of either California or Nevada (Report, p. 47) is not supported by any evidence. The Special Master only obliquely refers to the background and events which gave rise to the joint-state survey (Report, p. 45, footnote 20). As noted, these events led to armed conflict with loss of life and wounded—an event unparalleled in the history of boundary disputes to come before this Court. Nevada submits that exposure to this background is essential to a determination of whether California and Nevada marked "their true and ancient boundary", theretofore undefined, on the ground. *Rhode Island v. Massachusetts,* supra, at 734; *Virginia v. Tennessee,* supra, at 522.

Fourteen years after California's admission in 1849, her eastern boundary was uncertain, ill-defined and unknown on the ground. The eastern limits of her territory was a concern of nearly every legislature (Exhibits 42 through 52, 60, 61, 80, 81, 82). Fremont's 1848 map (Exhibit 193) used by the 1849 Constitutional Convention depicted Lake Bonpland (Tahoe) lying entirely west of the 120th Meridian. The first indication that California's eastern boundary lay somewhere in the Lake Tahoe basin came in 1856 when George Goddard determined that the point of intersection of the 120th Meridian at the 39th Parallel fell within Lake Bigler's (Tahoe's) waters and that Carson Valley was in Utah Territory (Exhibit 78).

In 1862 the Nevada Territory was organized and

populous settlements grew along the areas of supposed boundary—a farming and ranching community in Honey Lake Valley and the important mining district of Aurora. Dispute over Aurora's location led to both state and territorial legislatures designating Aurora as the county seat of a county organized by each. Delegates from Aurora were seated in both legislatures. Settlers in Honey Lake Valley were unsure of whether they were under the jurisdiction of California or Nevada. Factions asserting competing jurisdiction finally clashed in armed conflict at Susanville in Honey Lake Valley. A truce was declared and the matter of disputed jurisdiction referred to Governor Stanford and Acting Governor Clemmons. Stanford's emissary met with Clemmons, and Stanford's account of that meeting in his report to the California legislature on the many difficulties experienced with Nevada over the boundary's location, caused the legislature to direct a survey of California's eastern boundary and to invite Nevada to appoint a commissioner to accompany and participate in the survey (Exhibits 54 through 59). The joint-survey marked the 120th Meridian and also surveyed some 103 miles along the oblique line. Lawson surveyed an additional 73 miles along the oblique line as a commissioner for both states, supra, page 19. Thus, 176 miles were surveyed and monumented to within a few miles of the termination of Nevada's boundary with California at the 37th Parallel.

The limits of either state being unknown, the Houghton-Ives Survey did not "cut off an important and valuable portion" of either state and therefore the

political power of California and Nevada was not enlarged. *Virginia v. Tennessee,* supra, p. 520–21. The Houghton-Ives Survey did "simply serve to mark and define that which actually existed before, but was undefined and unmarked." *Virginia v. Tennessee,* supra, p. 520. The Houghton-Ives Line had no effect upon the political influence of either state as neither gained or lost territory. The respective limits of each state was marked and defined on the ground for the first time with the intent that each state would then know the line up to which her jurisdiction could be asserted.

The boundary having thus been marked jointly for the first time and recognized by the United States, supra, pp. 20–22, it follows that any change thereafter in its location would alienate the territory of one or both states. This is precisely what occurred when the boundary was reset over to the line of Von Schmidt's Survey. Lands once in Nevada but which the Special Master now recommends be placed in California is ample proof of the alienation effected by the posting of Von Schmidt's Survey as the new boundary. Indeed, no clearer proof of alienation is there than the effect of a decree of the Houghton-Ives Line as the true boundary for such would remove or obviate the necessity for preserving the sancity of private titles and the selections of the public lands patented in reference to the joint-state survey of 1863–65.

3. THE SPECIAL MASTER'S CONCLUSION THAT THE PURPOSE OF THE VON SCHMIDT SURVEY WAS TO ESTABLISH THE BOUNDARY TO

RESOLVE AN INHERENT CONFLICT IN LOCATION OF MERIDIAN IS CONTRARY TO THE UNCONTRADICTED AND SUBSTANTIAL EVIDENCE THAT THERE WAS NO DISPUTE BETWEEN CALIFORNIA AND NEVADA REGARDING THEIR LINE OF BOUNDARY.

The Special Master noted that there was a conflict in location of the 120th Meridian at the 42nd Parallel as marked by Houghton-Ives, and as marked five years later by Major when beginning his survey of the California-Oregon Boundary to the Pacific. (Report, pp. 21, 22). The Special Master, while characterizing this as an "inherent conflict" in locations of meridian (Report, pp. 46, 47), equates this conflict as a disputed location of meridian in need of settlement.

There was no dispute between California and Nevada as to the location of the 120th Meridian because both states had previously marked it on the ground and were contented with it. Moreover, the Houghton-Ives Survey was the only location of the 120th Meridian on the ground between the 42nd and 39th Parallels. At the very most, there was only an expression of concern by the United States Surveyor General of California to the General Land Office in Washington over Major having begun his survey of California's north boundary some two miles and thirty chains west of Houghton-Ives' location. (Exhibits 101, TTT).

Thus, it was the concern of United States officials, not a dispute between California and Nevada, which led to Von Schmidt's Survey. Even assuming that there was a dispute between the two states, it could

not have been settled then by the unilateral action of the United States anymore than it can today. Instead, a dispute would have been settled by agreement under the Compact Clause or by invoking the original jurisdiction of this Court and obtaining a decree of boundary.

Notwithstanding this total absence of dispute between California and Nevada, the United States was not satisfied and sent Von Schmidt who surveyed a different location of the 120th Meridian. Obviously, such unilateral action by the United States does not satisfy the constitutional requirement of changing state boundaries under the Compact Clause or by decree of this Court. Therefore, The Special Master's justification for Von Schmidt's Survey to settle a conflict of meridians is without any evidentiary support if he means to imply that there was, as between California and Nevada, a disputed location of meridians in need of settlement.

IV.

THE SPECIAL MASTER'S RECOMMENDATION OF THE COAST & GEODETIC SURVEY OF 1893-99 AS THE OBLIQUE BOUNDARY SHOULD NOT BE ACCEPTED BECAUSE:

A. THE SPECIAL MASTER JUSTIFIES THE NECESSITY OF A RESURVEY OF THE OBLIQUE BOUNDARY BECAUSE VON SCHMIDT'S OBLIQUE SURVEY WAS NOT AN ACCURATE SURVEY, WHICH IS CONTRARY TO THE SPECIAL MASTER'S OWN

RECOGNITION OF THE DECISIONS OF THIS COURT APPROVING INACCURATELY-SURVEYED BOUNDARIES BEING OBSERVED BY TWO STATES; AND

THE SPECIAL MASTER'S CONCLUSION THAT VON SCHMIDT'S SURVEY, NOTWITHSTANDING MANY INACCURACIES, WAS EFFECTIVE TO ESTABLISH THE MERIDIONAL LINE IS INCONSISTENT WITH HIS CONCLUSION THAT VON SCHMIDT'S SURVEY DID NOT ESTABLISH THE OBLIQUE PORTION BECAUSE IT WAS NOT AN ACCURATE SURVEY.

The Special Master is critical of Von Schmidt's oblique survey because it stopped short of being corrected back to Lake Tahoe. But Von Schmidt's contract and special instructions did not require that he correct back to the lake (Exhibits 133, VVV). Although the Special Master recognizes evidence of errors in Von Schmidt's location of the 120th Meridian (Report, p. 28) and recognizes the General Land Office's strong criticism of the accuracy of Von Schmidt's meridional survey (Report, p. 27), the Special Master does not fault the meridional portion of Von Schmidt's Survey.

The evidence shows that the entire Von Schmidt Survey was not any more perfect or correct than any previous or subsequent surveys. Indeed, Von Schmidt's oblique line is inaccurate only because his meridional line is 1609 west of the geodetic meridian according to Grunsky-Minto's survey (Exhibits 161,

S); some 1727 feet west of the geodetic meridian according to the Coast & Geodetic Survey of 1899 (Report, p. 28); and approximately 1250 feet west of the geodetic meridian according to the National Geodetic Survey conducted in 1978. (Exhibit 239). Nor do these inaccuracies matter as this Court has approved many inaccurately-surveyed lines which two states had been observing and has decreed the same as the true boundary. The Special Master indeed recognizes this rule (Report, p. 40) but applies it selectively and inconsistently. He concludes that Von Schmidt's oblique line was in need of re-surveying because it was inaccurate and did not establish the oblique boundary while he concludes Von Schmidt's meridional survey, though not accurate, did define and establish the true boundary.

Nevada submits that these inconsistencies of the Special Master undermine his recommended lines. Either the Von Schmidt Survey, despite its inaccuracies, established the entire boundary line or it did not establish any of it. If consistency is to be our guide in such an important matter as the boundary between two states, then the Special Master should have recommended the entire Von Schmidt Survey as the true boundary from Oregon to the Colorado River. Nevada submits that if Von Schmidt's oblique survey did not establish the oblique boundary because of inaccuracies, then neither did his survey of the 120th Meridian establish the meridional boundary because the Special Master recognized its inaccuracy. The Special Master should therefore have recommended the Houghton-Ives Survey since it was the only other

survey of the 120th Meridian, in combination with his recommendation of the Coast & Geodetic oblique line.

To be sure, this double standard accorded Von Schmidt's meridional survey *vis a vis* his oblique survey is the only way of validating the status quo out of moral considerations of displacement and disturbance of boundary lines upon residents on either side of the Special Master's recomended lines. If so, these same moral considerations were equally applicable to residents of Nevada and California displaced in 1872, 1873 and 1899 when the United States disturbed the posted boundary between the peoples of each state. As noted, supra, p. 27, it is only because a decree of Von Schmidt's meridional survey and the Coast & Geodetic oblique survey that problems of land titles of present day occupants arise by virtue of displacement of their predecessors in interest from Nevada into California in 1872, 1873 and 1899. Moreover, California residents east of the Sierra Crest have long yearned to be Nevada residents and California has refused their requests for a plebiscite to express this preference (Exhibit 40).

B. CONTRARY TO THE SPECIAL MASTER'S FINDING, THE UNCONTRADICTED EVIDENCE SHOWS THAT THE COAST & GEODETIC SURVEY DID TAKE EFFECT AS "AN ALIENATION OF TERRITORY" OF BOTH CALIFORNIA AND NEVADA, AND THAT IT WAS NOT "A DEFINITION OF THE TRUE AND ANCIENT BOUNDARY" IN

THAT CALIFORNIA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 321 SQUARE MILES AND NEVADA LOST TERRITORIAL SOVEREIGNTY AND JURISDICTION OVER 65 SQUARE MILES.

If the joint-state Houghton-Ives Survey did not establish the true boundary between California and Nevada, then the United States was free to survey and mark their boundary. Von Schmidt's Survey was marked and posted on the ground by imposing iron monuments, stone monuments, and by cut granite monuments removed from the Houghton-Ives boundary line. Von Schmidt's oblique survey was the posted boundary in the field until 1899 when the Coast & Geodetic Survey marked and posted its oblique line as the boundary. The Special Master does note that the Coast & Geodetic Survey resulted in California losing to Nevada 321 square miles of her territory and Nevada losing 65 square miles to California (Report, p. 28). Since a loss of political jurisdiction and influence by each state over significant territory did occur, then according to *Virginia v. Tennessee,* supra, p. 521-22, the Coast & Geodetic Survey did not, contrary to the Special Master's finding, take effect as a definition of the true and ancient boundary, but took effect as "an alienation of territory."

This view of the Special Master that California and Nevada had no defined oblique boundary until 1899 is unsupported by the evidence. Despite the Special Master's conclusion that there was no definitive approval by the General Land Office of Von

Schmidt's oblique survey, the evidence clearly shows that the Commissioner of the General Land Office instructed U.S. Surveyors General in California and Nevada to respect the new survey in issuing patents and in conducting and closing the public survey lines thereon.[2] More importantly, these instructions did not distinguish as to Von Schmidt's meridional survey or his oblique survey, and neither were the U.S. Surveyors General instructed to observe the meridional survey but disregard the oblique survey. No less than twenty-two California exhibits are in evidence of correspondence and instructions between General Land Office officials and U.S. Surveyors General in the field to observe Von Schmidt's entire survey and directing compliance therewith. (Exhibits 109 through 113, 135, 210 through 215, 217, 218 through 231). The General Land Office also approved Von Schmidt's map of his oblique survey (Exhibit KKKK). And, as if more were required to indicate the United States' recognition of the entire Von Schmidt Survey, the General Land Office continued to recognize Von Schmidt's oblique line until 1928 when it was directed by the Secretary of Interior to begin reclosure of public land surveys on an 83-mile segment of the Coast & Geodetic survey (Exhibit NN).

The Special Master's observation that neither California nor Nevada adopted Von Schmidt's Survey by statute (Report, p. 27) is indicative of a failure to perceive that under the Constitution the United States,

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[2]The Special Master incorrectly notes that the two states were required to close the public lines along Von Schmidt's surveyed boundary line (Report, p. 28).

when setting a state's boundary not previously defined on the ground, does so pursuant to a constitutional power and not by consent of the states. Assuming, *arguendo*, a constitutional necessity for each state's statutory recognition, California's belated repeal in 1978 of the Houghton-Ives Line and adoption of Von Schmidt's meridional survey is insufficient to establish Von Schmidt's meridian as the boundary since Nevada still recognizes by statute the 1863 Houghton-Ives Line.

Further, having faulted the Houghton-Ives Survey for not being a complete survey, the Special Master then throws out the very portion of Von Schmidt's Survey which made it a complete, indeed, the only complete survey of the entire California-Nevada Boundary.

The Special Master next concludes that the Coast & Geodetic survey was "an attempt to resolve disputes as to the true boundary." Once again, there is a total lack of evidence tending to show that California and Nevada had a dispute over the location of Von Schmidt's oblique line. The evidence merely shows that California in time came to be disenchanted with Von Schmidt's oblique line of boundary and inveigled United States officials and Congress to have the oblique portion resurveyed for reasons not altogether unsuspect (Nev. Ans. Br. pp. 135–136). There have been only two disputes between California and Nevada over their boundary—the first in 1863 which resulted in its being marked for the first time, and the present original proceeding.

The Special Master again confuses dissatisfaction

by California and federal officials alone as being disputes between two sovereign states. If the Special Master is correct in his view that mere dissatisfaction by a single state or by federal officials or by Congress, is a sufficient basis to move a joint-state boundary, then there is no reason why the boundary between California and Nevada could not be moved again by a unilateral survey by the United States.

V.

THE SPECIAL MASTER'S CONCLUSION THAT "IN THE ESTABLISHMENT OF NEVADA'S BOUNDARY IT WAS BELIEVED THAT THE 43RD MERIDIAN WEST FROM WASHINGTON AND THE 120TH MERIDIAN WEST FROM GREENWICH WERE THE SAME" IGNORES CONGRESS' OWN REPORT ON THE AMERICAN PRIME MERIDIAN.

The 43rd Meridian west from Washington is of interest to Nevada if this Court should decide a new meridional survey is necessary, in which event, Nevada has counterclaimed for a boundary along the 43rd Meridian which has never been located on the ground.

Nevada is therefore disturbed by the Special Master's failure in his discussion of the matter (Report, pp. 6, 7, fn. 3) to ascertain the intent of Congress. Moreover, the Special Master relies on the author of a tourist's guide to early Nevada and on statements of Nevada surveyors general made long after statehood.

It should be first observed that the source of Nevada's western meridional boundary in terms of a

meridian west from Washington is not the Nevada Constitution. It was prescribed by Congress in Nevada's Enabling Act (Exhibit M). Further, the Special Master's conclusion ignores a report adopted by the Congress which was the basis for the act of September 27, 1850 in which Congress declared that the Washington Meridian would be used for all future astronomic purposes while retaining the Greenwich Meridian for nautical uses. This report (Exhibit J) was made by a special committee of the American Association for the Advancement of Science appointed at the request of the Secretary of Navy to review the feasibility of establishing an American Prime Meridian in place of the Greenwich Meridian. This report repeatedly comments on the then existing knowledge that a degree of Greenwich Meridian would not coincide with a degree of Washington Meridian, but that the Washington Meridian expressed in terms of Greenwich Meridian would always be 77° plus 3 or 4 seconds. (Exhibit J, pp. 4, 5, 20, 26, 34, 37 and 50). This report was debated in Congress and ordered printed (Exhibit I).

Congress then was aware that longitudes measured from Greenwich and Washington would not be congruent and that a Washington Meridian would be west of a Greenwich Meridian. By prescribing Nevada's meridional boundaries measured from the Washington Meridian, Congress was abiding by its 1850 statute requiring use of the Washington Meridian. If Congress wanted to retain a Greenwich Meridian for Nevada, it could easily have expressed Nevada's eastern and western boundaries in terms of

the Greenwich Meridian. Congress twice has extended Nevada's eastern boundary—to the 38th Meridian West from Washington and later to the 37th Meridian. Nevada's eastern boundary was surveyed on a Washington Meridian (Exhibit TTT, pp. 50, 51). Moreover, all the western states' numbered meridional boundaries have been laid out on the ground using the Washington Meridian.

If the Special Master's conclusion that it was believed the 43rd and 120th were one and the same, then similar logic compels the conclusion that Nevada's eastern boundary is 114° West from Greenwich and extends some two and three-quarters miles easterly into what is now the State of Utah. Nevada submits that it is the intent of Congress which is controlling in this matter, and not the surmise of an itinerant tourist guide author and later persons who had no intimate knowledge of why Congress prescribed Nevada's boundary on a Washington Meridian.

VI.

THE SPECIAL MASTER HAS NOT RECOMMENDED A BOUNDARY LINE WHICH WOULD BE A FINAL LINE SINCE BOTH RECOMMENDED LINES WERE SURVEYED BY THE UNITED STATES IN THE ABSENCE OF DISPUTE BETWEEN CALIFORNIA AND NEVADA, AND IF THE SPECIAL MASTER'S CONCLUSION THAT THE UNITED STATES MAY MOVE A STATE'S BOUNDARY IN THE ABSENCE OF TWO STATES DISPUTING THEIR BOUNDARY IS CONFIRMED, THEN THE

UNITED STATES MAY ESTABLISH THE BOUNDARY ON ANOTHER LOCATION; AND THERE WOULD BE GRAFTED ONTO THE CONSTITUTION A NEW MEANS OF CHANGING A STATE'S BOUNDARY, INDEPENDENT OF THE CONSTITUTION'S PRESENT REQUIREMENT OF A DISPUTED BOUNDARY TO BE RESOLVED UNDER THE COMPACT CLAUSE OR BY DECREE PURSUANT TO THIS COURT'S ORIGINAL JURISDICTION.

The surveys recommended by the Special Master were performed by the United States in the absence of any dispute between California and Nevada over the location of their meridional or oblique line of boundary—on this the evidence is clear. Although the unilateral conduct of the United States may be overlooked or ignored, it can not be explained or justified on constitutional grounds.

Nevada, having had territory carved from her western limits on three occasions by the United States, and having a common boundary with four other states, takes a strict view of the requirements of the Constitution in the matter of changing a state's boundary. Nevada understands the decisions of this Court stand for the oft-enunciated proposition that actions of the Executive or the Congress are to be taken pursuant to power conferred by the Constitution. The Special Master characterizes Nevada's argument that the United States cannot constitutionally move a state boundary once set and that a state's acquiescence by inaction cannot constitutionalize it as a "rather novel question." (Report, p. 45).

The Special Master inferentially recognized the principle of a state's inability to acquiesce in an unconstitutional act, but he declined to pursue this line of inquiry because there were no federal cases applying it. (Report, p. 46). Assuming the absence of federal decisions were reason to overlook its potential application here, the Special Master misconstrued the purpose for which Nevada stated that no federal cases had been found. Nevada made this statement not as to a state's inability to acquiesce in an unconstitutional act, but made it in regard to her argument that long acquiescence cannot legalize an usurped power. (Nevada's Ans. Brief, pp. 89, 89a). Nevada cited several decisions of this Court to the effect a state cannot directly act with another state or with the United States to confer non-existent power or alter the constitution. These same decisions are cited, supra, page 16. And if a state cannot do it directly, clearly a state may not by her inaction and silence indirectly confer the absent power. The Special Master nonetheless bases his recommended line of boundary upon the states' factual acquiescence.

If the recommended lines are to be constitutionalized because of either state's factual acquiescence, then nothing will stand in the way of the United States, whenever it choses, to resurvey and relocate the boundary line.[3] And the state which loses territory to the other may either acquiesce therein, or perhaps question the right of the United States to move it

[3]The opportunity to do so may arise as early as 1983 when the United States will readjust geodetic grid control for latitude and longitude from 1927 Datum (Landrum's Test., Transcript, pp. 338, 339).

by seeking injunctive relief against performance of the resurvey or against movement of subsisting boundary monuments. Of course, such proceeding for injunctive relief would raise the very same question already presented here and which should be addressed and answered now, that is, whether the United States can willy-nilly relocate posted boundary lines being observed by two states.

That the United States may be able to relocate the boundary in the future prompts the suggestion that the United States will not be bound by the decree of boundary herein. If the United States would not be bound, then it should be made a party or participate in these proceedings to determine the lawful boundary. *Florida v. Georgia,* 17 How. (58 U.S.) 478, 495.

Nevada is troubled, as any proponent or scholar of the Constitution would be, by the principle which, if the Special Master's basis for his recommended lines is sustained, will emerge—states may agree to the destruction or emasculation of their right and standing under the Constitution. Truly, then, usurped power will wear the cloak of constitutionality—acquiescence having ascended to a pre-eminence never before attained and heretofore rejected by this Court, supra, p. 16.

Further, the prospect of the United States being able to move, unless somehow restrained by a state, two states' subsisting boundary will add to the Constitution a new method of changing a state's boundary. Presently, there must be a dispute between the states

over their boundary's location. The disputed boundary may only be changed to a new location by Compact with approval of Congress, or if unable to agree, by invoking the original jurisdiction of this Court for a decree of boundary. *Poole v. Fleeger,* 11 Pet. (36 U.S.) 185; *Hinderlider v. La Plata River Co.,* supra. In *Rhode Island v. Massachusetts,* supra, this Court declared at pp. 726–27:

> There can be but two tribunals under the Constitution who can act on the boundries of states, *the legislative or the judicial power,* the former is limited, in express terms, to assent or dissent, where a compact or agreement *is referred to them* by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist. (Emphasis added)

The foregoing holding purposely omits the executive power and requires that the states initiate the change by referring a compact to Congress. Congress may not make compacts between states. *Kansas v. Colorado,* 206 U.S. 46, at 97. But the foregoing holding in *Rhode Island v. Massachusetts* will become empty words if the United States is permitted to move states' boundaries in the absence of the states disputing their boundary.

The dispositive question to be answered in the case *sub judice,* indeed, to be faced, is did the Federal government act under a power granted it by the Constitution when it moved the posted boundary between California and Nevada? If it did so act in 1872–73 and in 1899, then the case *sub judice* will rest upon the

holding that the actions of the United States in moving the agreed boundary was in pursuance of constitutional authority. On the other hand, if these actions of the Federal government were not authorized by the Constitution, then they cannot become constitutional by mere silence and efflux of time, regardless of its length.

VII.

IT IS UNCLEAR FROM THE FIRST RECOMMENDATION WHETHER THE SPECIAL MASTER IS RECOMMENDING A CONNECTION OF VON SCHMIDT'S MERIDIONAL LINE WITH A PROLONGATION OF THE COAST & GEODETIC OBLIQUE LINE AT A POINT WHICH IS NOT THE 39TH PARALLEL AS LOCATED BY VON SCHMIDT OR THE COAST & GEODETIC SURVEY, IN WHICH CASE THE SPECIAL MASTER HAS MADE THE CONNECTION FOR THE PARTY STATES "AT A POINT APPROXIMATELY AT SUCH INTERSECTION"; AND THEREFORE, HIS SUGGESTED COURSE OF ACTION IN THE SECOND RECOMMENDATION IS UNNECESSARY; OR WHETHER HE HAS RECOMMENDED AN OBLIQUE LINE FROM THE POINT OF CONNECTION OF VON SCHMIDT'S MERIDIONAL LINE WITH HIS 39TH PARALLEL, OR A CONNECTION WITH THE 39TH PARALLEL AS LOCATED BY THE COAST & GEODETIC SURVEY; AND IF HE HAS RECOMMENDED THE LATTER, THEN IT IS AN OBLIQUE LINE WHICH HAS NEVER BEEN

SURVEYED AND WOULD NOT INTERSECT THE COAST & GEODETIC SURVEY UNTIL IT REACHED THE COLORADO RIVER.

Von Schmidt's point of intersection of his 120th meridional line with his location of the 39th Parallel (at point A on Exhibit A, Appendix) lies south and west of the termination of the Coast & Geodetic Survey's oblique line at its location of the 39th Parallel (at point B on Exhibit A). Therefore, Von Schmidt's meridional line does not intersect the Coast & Geodetic Survey's oblique line. But a prolongation of the Coast & Geodetic Survey northwesterly from point B will intersect Von Schmidt's meridional line at point C on Exhibit A.

The Special Master recommends the 120th Meridian "as marked and determined by Von Schmidt to the point in Lake Tahoe where such north-south line[4] intersects the 39th Parallel * * * and continuing from such point on a straight line known as the * * * [Coast & Geodetic Oblique]". The Special Master fails to indicate whose location of the 39th Parallel he means. The Special Master has connected the two lines at point C on a parallel north of both Von Schmidt's and the Coast & Geodetic's 39th parallels. This must be so because if the Special Master has connected Von Schmidt's meridional line with the 39th Parallel as located by the Coast & Geodetic Survey at point C1 on Exhibit A or with Von Schmidt's own 39th Parallel at point A, then he has not connected with terminal

[4]Von Schmidt's meridional line is not on a true south meridian but veers to the west as it proceeds southerly from Verdi.

point B of the Coast & Geodetic Oblique. He would have connected Von Schmidt's meridional line either (1) with an oblique line at point C1 never surveyed and which would not intersect the Coast & Geodetic's oblique line until it reached the Colorado River; or (2) has connected with Von Schmidt's own oblique line at Point A.

If the Special Master is recommending his connection of Von Schmidt's meridional line with a prolongation of the Coast & Geodetic oblique line, then the course of action recommended by the Special Master in his second recommendation is not necessary. If this Court is disposed to adopt the boundary lines recommended by the Special Master, then in that event, Nevada would be agreeable to accepting the connection made by the Special Master of Von Schmidt's meridional line with the Coast & Geodetic Survey oblique line as depicted on Exhibit B, Appendix; provided, that said point of intersection will be referenced to and adduced from: (1) a ranged prolongation in a southerly direction of Von Schmidt's location of the 120th Meridian from Point D on the north shore to Point E on the south shore of Lake Tahoe as depicted on Exhibit B; (2) with a ranged prolongation in a northwesterly direction of the Coast & Geodetic Oblique line from Point F at the southeast shore to Point G on the western shore of Lake Tahoe as depicted on Exhibit B.

VIII.

TO THE EXTENT THAT THE SPECIAL MASTER'S THIRD AND SEVENTH RECOMMENDATIONS

MAY BE READ AS IMPLYING A NEED TO MARK EITHER OF HIS RECOMMENDED LINES ON THE GROUND, SUCH REMARKING IS UNNECESSARY *AS BOTH LINES ARE ADEQUATELY MARKED* NOW, AND THE EXPENSE OF ANY SUCH REMARKING, IF DEEMED NECESSARY, SHOULD BE BORNE BY THE UNITED STATES.

These two recommendations of the Special Master may be read as inferring a need to resurvey and remark his recommended lines. Should this Court adopt the Special Master's recommended lines, Nevada sees no need to resurvey or remark them as both are sufficiently marked and posted on the ground. Further, if such resurvey and remarking were necessary, then the cost thereof should be borne by the United States since it was dissatisfied with the joint-state line and caused the recommended lines to be surveyed and marked and does presently maintain these surveys as the boundary between California and Nevada.

CONCLUSION

The Court should decline to adopt the boundary lines recommended by the Special Master because the recommendations are contrary to the evidence and to the decisions of this Court and are needlessly based on the doctrine of acquiescence and prescription. The decree of boundary herein should be based upon

power in the United States and not upon acquiescence and prescription.

California and Nevada constitutionally established their boundary in 1863–65 by their joint survey and the Houghton-Ives Survey should be decreed the boundary herein. Such a decree should also provide for a survey from the Houghton-Ives terminal point on the oblique to the 1961–66 Compacts point at the Colorado River. A decree of the joint-state surveyed line will least disturb rights and titles derived from the many grants of the United States and by the two states in reliance upon the joint-surveyed boundary line of 1863.

If the Court holds that California and Nevada did not jointly establish the constitutional line of boundary in 1863–65, then the entire Von Schmidt Line, being the first and only survey by the United States of the entire California-Nevada boundary, should be decreed the boundary line. Such a decree should be premised on a determination that the United States had constitutional authority to establish initially the California-Nevada boundary by Von Schmidt's Survey of 1872–73; and that the oblique portion of Von Schmidt's Line, then being the posted line of boundary between the two states, could not thereafter have been moved to a new location unless it were then dis-

puted by the two states and settled then pursuant to the Compact clause or by decree of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James H. Thompson, Special Deputy Attorney General, and one of Defendant's counsel herein, hereby certify that on the 12th day of December, 1979, I mailed by first class mail, postage prepaid, a copy of Defendant, State of Nevada's Exceptions to Report of Special Master and Brief, to each of the following:

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APPENDIX

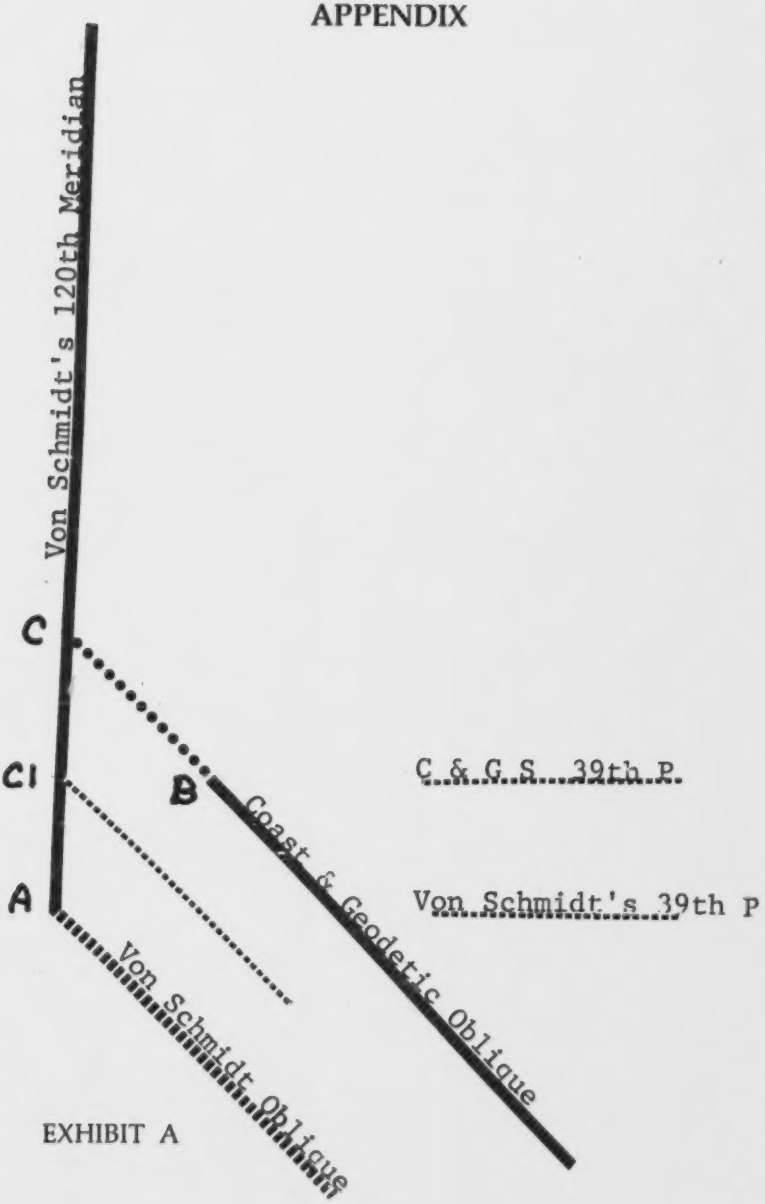

EXHIBIT A

APPENDIX

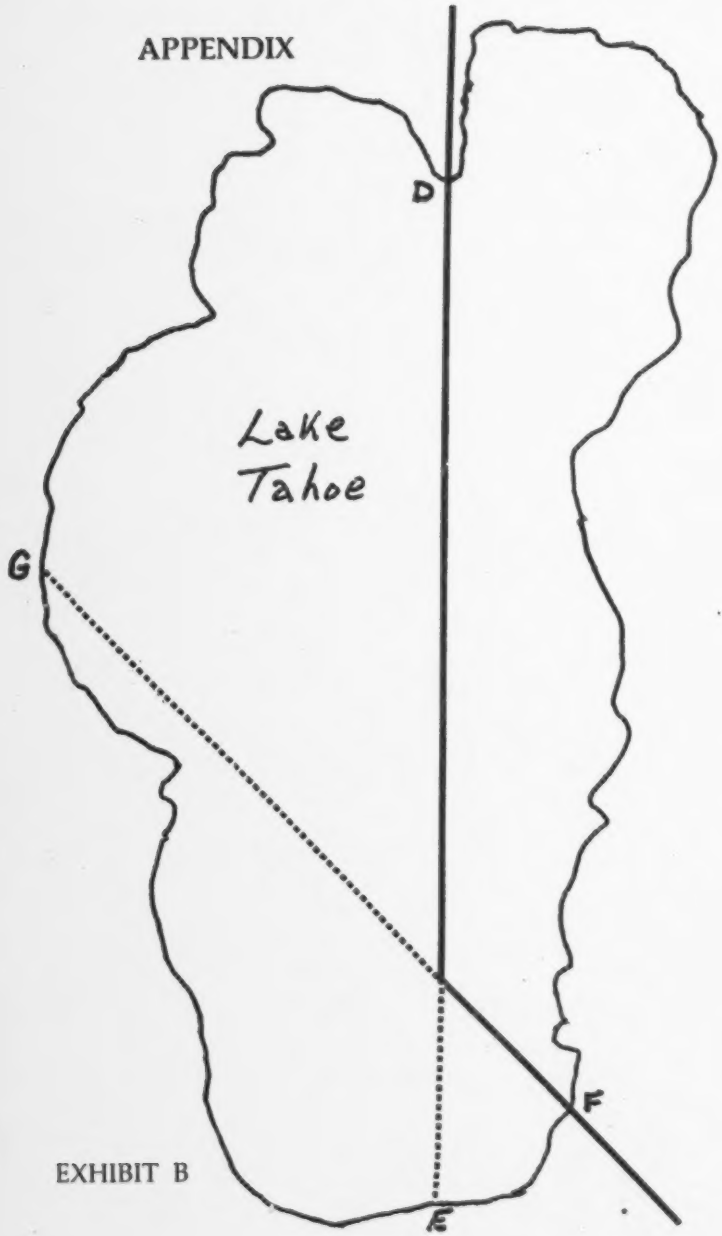

EXHIBIT B

Supreme Court, U. S.
FILED
JAN 10 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 73, Original

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF NEVADA,
Defendant.

REPLY BRIEF OF PLAINTIFF STATE OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

REPLY BRIEF OF PLAINTIFF STATE OF CALIFORNIA

INTRODUCTION

The boundary between California and Nevada was fixed by California's Constitution of 1849, never to be changed without the consent of that state. From Oregon to Lake Tahoe it was set on the 120th meridian west of Greenwich; a line meant to be "as near as practicable to the eastern base of the Sierra Nevada." Browne, Report of the Debates in the Convention of California of September-October, 1849 (Arno Press ed. 1973) p. 427. From its intersection with the 39th parallel in Lake Tahoe, it runs in a straight line southeasterly to a point in the Colorado River where it intersects the 35th parallel. Cal. Const. of 1849, art. XII, ex. 5. This Court is asked

to decide which of several surveys purporting to show that boundary should be confirmed or, should all proposed lines prove unacceptable, to order a new survey.

In his report, the Special Master reviewed a half-century of efforts to establish the boundary between California and Nevada. Following Justice Holmes' observation that a page of history is worth a volume of logic, he concluded that the lines respected and observed by both states for periods of 108 years (in the north) and 80 years (in the south) should be confirmed by this Court as marking California's eastern boundary.

In her exceptions, Nevada necessarily trod a narrow and perilous path. For she was compelled to make two distinct and inconsistent arguments in her contentions with respect to the boundary north of Lake Tahoe (referred to variously as the "northern" or "meridional" boundary) and that portion from Lake Tahoe to the Colorado River (the "oblique" boundary).

Nevada's Contentions Respecting the Northern Boundary

In order to satisfy her historical but long quiescent desire for a strip of Eastern California on the northern boundary (e.g., exs. 28–32, 34, 37), it was necessary for her to resurrect a survey undertaken by the states in 1863 but abandoned by them when the federally-financed Von Schmidt Survey of 1872–1873 was completed. The 1863 line should be revived, Nevada contends, regardless of its obsolescence and the fact that subsequent surveys found it to be much more inaccurate than even the line presently observed. Exs. 64, 161, 239,

DDDD. The reason: State's rights. The federally-financed Von Schmidt Survey replaced the 1863 survey undertaken by the two states. It was, therefore, an officious and unconstitutional interference with state sovereignty. Since the federal government had no constitutional power to survey interstate boundaries, its acts in contracting for the Von Schmidt Survey were void. The survey was consequently tainted and could not have the effect of marking state boundaries.

What of the undisputed facts showing that Nevada not only accepted but welcomed the survey? E.g., exs. 114, 136, 137. Immaterial, answers Nevada, because a state may not assent to an unconstitutional act.

What of the 108 years following in which both states observed the 1873 line? The doctrines of prescription and acquiescence have no effect, she replies, because California's assertion of jurisdiction was not based on a claim of right.

In short, Nevada's contentions for resurrection of an 1863 line on the northern segment of her western boundary require adoption of the premises that:

1. A federally-financed survey of an interstate boundary is invalid and may not be accepted and observed by the states affected; and

2. The states may not acquiesce in a line which was delineated by a government lacking the constitutional power to do so.

These assumptions require the rejection of the well-established body of law this court has set forth on the subject of acquiescence and the adoption of a new and

novel theory which could deprive the United States of much of its power to survey the public lands.

Nevada's Claims with Respect to the Oblique Boundary

With respect to the oblique boundary, however, this argument would not do. This is because the state surveyors of 1863 only ran their line some 103 miles south of Lake Tahoe before they abandoned their work. Exs. 91, 99, DDDD. There is, therefore, no state-conducted survey of the oblique boundary to revive, regardless of Nevada's protestations that, adding an additional 73 miles subsequently run, a survey was completed "to within a few miles" of what was then the termination of Nevada's boundary at the 37th parallel. Nevada's Exceptions and Brief 26.[1] To create an oblique boundary more to her liking, therefore, Nevada urges an imaginative variety of solutions. First, she suggests, continue where Messrs. Houghton and Ives left off in 1863 and extend their survey to the Colorado River. If this will not do, restore Von Schmidt's survey of the oblique boundary conducted in 1874 (even though it was conducted under federal auspices and therefore is, under Nevada's first theory, invalid.)

Lastly, Nevada renews her contention that when it

[1] Little evidentiary support exists for defendant's assertion that the additional 73-mile survey performed by James Lawson was made on behalf of *both* states. It appears, on the contrary, that Lawson acted solely on behalf of Nevada, exs. 64, pp 270, 274; and that California never authorized participation in the Nevada-sponsored survey. Nevada's Responses to California's Second Request for Admissions 24(a)–(d). Furthermore, neither state statutorily adopted Lawson's survey, as they had the previous work of Houghton-Ives. Ibid.

admitted her to statehood, Congress intentionally changed California's eastern boundary from the 120th meridian west of Greenwich to the 43rd meridian west of Washington, thus giving away nearly three miles of that state to Nevada, notwithstanding the evidence showing that the two lines were believed to be congruent, and the clear constitutional obstacles in the way of such a grant. See plaintiff's brief, pp. 42–46.

SUMMARY OF ARGUMENT

The boundary between California and Nevada, described in California's Constitution of 1849, was the subject of five surveys in the nineteenth century. The last two of those surveys established that boundary from Lake Tahoe to Oregon in 1872 and from Lake Tahoe to the Colorado River in 1899.

These surveys were financed in the first case and conducted in the second by the federal government as part of its power and duty to survey and define the boundaries of the public lands. They were accepted by both states immediately, and have been observed by them in the performance of governmental functions ever since. In the face of these undisputed facts, the Special Master has properly recommended that they be confirmed as marking the established boundaries between the states.

At the time of their initial establishment, either state could conceivably have challenged their validity, and contended that the federal government acted ultra vires in surveying an interstate boundary. It is too late to raise these contentions now. The northern "meridional" line

established by Allexey Von Schmidt in 1873 was welcomed by both states, marked on the ground, and observed ever since—except to the extent the federal government was slow in closing its public land surveys on it and permitted Nevada to select additional lands within California in what appears to have been more a spirit of opportunism than a claim of right. See Nevada's Surveyor General's Report of 1911, ex. 232.

Whether laches, acquiescence, or informal acceptance is the controlling doctrine, 108 years of acceptance in the north, and 77 years in the south are periods long enough to establish a boundary that should be confirmed by this Court once and for all.

If this Court should find, for one reason or another, that the existing lines should not be adopted, then a new survey can readily fix the location of the boundary set forth in California's 1849 Constitution and never changed since then.

ARGUMENT

I

THE VON SCHMIDT AND COAST AND GEODETIC SURVEY LINES RECOMMENDED BY THE SPECIAL MASTER WERE LAWFULLY SURVEYED, IMMEDIATELY ACCEPTED, AND HAVE BEEN OBSERVED BY BOTH STATES SINCE THEIR INCEPTION

The federal government is omnipresent in the early boundary surveys of the western states and territories. It was continuously called upon to survey the boundaries

of the newly-acquired territories of the west and delineate the public lands within them. See Van Zandt, Boundaries of the United States and the Several States 109, 118, 134 (Geological Survey Prof. Paper 909, U.S.G.P.O. 1976). No matter what our views of enveloping federal power may be, there was no other entity capable of performing these functions—so necessary to the identification of public lands and their eventual disposition or reservation.

Nevada suggests that because the federal surveys conducted here were made of boundaries between two states already admitted, they were ultra vires and unconstitutional, and therefore the states were incapable of consenting to them. These contentions are, as the Special Master suggests, novel ones, and are unsupported by authority.

A. The United States is Authorized to Survey the Public Lands and in So Doing, May Survey Interstate Boundaries

Assuming that the public lands remain in federal ownership when a state is admitted into the union (cf. *Pollard's Lessee* v. *Hagan* (1845) 44 U.S. (3 How.) 212, 228–229), the federal government has a duty to survey and define their limits both for purposes of administration and disposition. *United States* v. *State Investment Company* (1924) 264 U.S. 206; *Lane* v. *Darlington* (1918) 294 U.S. 331. School lands, internal improvement lands, and other public lands transferred to the states (e.g., Taylor, El Dorado or Adventures in the Path of Empire 156 (Rio Grande ed. 1967), all necessarily had to be located within the boundaries of the state to which they were

to be transferred. E.g., *Poole* v. *Fleeger* (1837) 36 U.S. (11 Pet.) 185; *Coffee* v. *Groover* (1887) 123 U.S. 1.

The present confused and sorry state of titles on the California-Nevada boundary demonstrates the need for greater, rather than less, diligence on the part of the United States in carrying out these responsibilities. E.g., exs. 210–234; Plaintiff's Brief in Support of Special Master's Report 51–60.

The record clearly shows that California, Nevada, and the United States all realized there was uncertainty as to the location of the 120th meridian after the Daniel Major Survey of 1868 and in the location of the "oblique" line after the work of Grunsky and Minto in 1890. Report of Special Master, pp. 21–22, 28; Plaintiff's Brief in Support of Special Master's Report, pp. 16, 39–42; Plaintiff's Opening Brief, pp. 40–52, 58–62), and both California and Nevada welcomed the participation of the United States in resolving this uncertainty. E.g., Plaintiff's Brief in Support of Special Master's Report,

In authorizing these surveys, Congress was neither attempting to form a new state out of the jurisdiction of either state nor attempting to take from either state to give to the other. The surveys were not intended to revise the states' constitutional boundaries but to make certain the location of these heretofore uncertain lines.

B. The States May Accept Any Objectively Ascertainable Line to Delineate Their Interstate Boundary. Whether Such a Line Was Surveyed by Federal Contract or Under State or Private Auspices is Immaterial

Whether the United States acted beyond its express or implied powers in surveying the interstate boundary between California and Nevada, the line thus estab-

lished was promptly accepted and observed by both states. It is conceivable that the two states might have arisen in a spirit of outraged sovereignty and rejected the federal surveys of 1872–1873 and 1893–1899. The fact is that they did not. See *Indiana* v. *Kentucky* (1890) 136 U.S. 479, 509. Instead, they observed them in their taxing and regulatory activities, in police and fire-fighting functions, in educational programs, and in all other governmental programs. E.g., exhibits, responses, and admissions cited in Plaintiff's Brief in Support of Special Master's Report 28–36. Whether these actions were prompted by parsimony or by practical recognition that, as public land states, they had better have boundaries acceptable to the General Land Office for purposes of state selections, the two states welcomed these lines, and have observed them up until the present time.

C. Contrary to Defendant's Assertion, it is Clear That California's Possession of Territory to the Von Schmidt Line North of Lake Tahoe and the United States Coast and Geodetic Survey Line Along the "Oblique" Boundary is Based On a Claim of Right and Color of Title to the Extent These Are Prerequisite to Establishment of an Acquiesced or Agreed on Boundary

Because the location of their interstate boundaries were uncertain, both states welcomed the participation of the United States in correcting and clarifying them, and accepted the completed surveys as settling the question. Exs. 114, 135–136, 138, 155–157, 164.

The fact that the federal government through the General Land Office and later the Bureau of Land Management has accepted these surveys as the interstate boundaries for purposes of closing the public land surveys (exs. 110–113, 134) provides added support for the

legitimacy of these lines.

Moreover, rightful occupation of both states up to these lines can be presumed from the failure of Nevada to object thereto and to its use of and reliance on them from the time of their completion to the present. See Plaintiffs' Opening Brief, pp. 27–33, 55–58. Indeed, defendant's admissions that the presently posted and marked boundary lines between the states are the Von Schmidt Line north of Lake Tahoe and the United States Coast and Geodetic Suvey Line along the "oblique" boundary and that its state and local governments have consistently observed these lines in the conduct of their duties is conclusive of a rightful claim and color of title by the State of California.

II

NEVADA'S WESTERN BOUNDARY IS BY ITS OWN TERMS COTERMINUS WITH CALIFORNIA'S EASTERN BOUNDARY. CONGRESS HAD NO POWER TO CHANGE CALIFORNIA'S BOUNDARY WITHOUT HER CONSENT, AND HAD NO INTENTION OF DOING SO

The Special Master found correctly that the reference to the 43rd meridian west of Washington in Nevada's Constitution of 1864 was intended by Congress to be congruent with the 120th meridian west of Greenwich referred to in California's Constitution of 1849.

In fact, it appears that the 43rd meridian west of Washington was not the same as the 120th meridian west of Greenwich but some 2.5 to 2.7 miles west of the 120th meridian. Exs. 42, PPPP. However, statutes should be

construed in harmony with the Constitution, and the Act and Proclamation of Nevada's admission can be so harmonized. The description of Nevada's constitutional boundary itself exhibits the understanding that the 43rd meridian west was one and the same as the eastern boundary of California. Nev. Const., art. XIV, sec. 1, ex. 19. The maps commonly in use showed the two meridians as identical. E.g., exs. 42, PPPP, 191–192. Nevada's previous territorial boundaries reflected at once her desire for this land and Congress' recognition that it could not be granted to her without California's consent. Act of Mar. 2, 1861, ch. 83, 12 Stat. 209, ex. 14, and Nevada's first state governor regretfully acknowledged that her boundary was "defined . . . on the west by the eastern boundary of that State." First Ann. Message of H.G. Blasdel, Governor, State of Nev., ex. 32.

Congress was presumably cognizant of its lack of constitutional authority to change the boundary of a state without its consent. *Louisiana* v. *Mississippi* (1905) 202 U.S. 1; ex. 42. So even assuming that Nevada's eastern boundary was set with the intent of giving her a nearly three-mile wide strip of California, such an effort must necessarily fail, because California never consented to such a cession. See ex. 32.

CONCLUSION

California's 1849 Constitution set forth her eastern boundary in clear and objective terms, capable of ascertainment by survey. Establishing the boundaries of a new state from the vast expanses of Alta California was not easy. But when the constitutional boundary was adopted in California's constitutional convention of 1849, "[M]ost of the members were better satisfied than they had anticipated. They had a State with eight hundred miles of sea-coast and an average of two hundred and fifty miles in breadth, including both sides of the Sierra Nevada . . ." Taylor, El Dorado, or Adventures in the Path of Empire, *supra,* p. 154. These boundaries were set forth in clear and objective terms, and all subsequent efforts from the emerging territory and State of Nevada to persuade California to cede her additional territory was rejected.

The lines recommended by the Special Master were made in response to deep-seated dissatisfaction by the states and the federal government—as landowner of the affected area—with preexisting lines (to the extent that they existed). They were made by the Department of the Interior in discharge of its obligation to survey and dispose of the public lands. They have been observed ever since, and should be confirmed now.

However, if this Court concludes that logic should prevail over history, the only constitutionally permissible boundary is that described in California's 1849 Constitution. It can readily be established by a new survey. Such an alternative would be at once no costlier and

infinitely more logically consistent a solution than that of retracing the long-abandoned, and admittedly inaccurate efforts at locating it made over a hundred years ago.

Respectfully submitted,

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MOTION FILED
FEB 10 1978

IN THE

Supreme Court of the United States

October Term, 1976
No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

Motion for Leave to File Brief Amicus Curiae on Behalf of California State Assemblyman Mike Cullen, Together With Brief Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1976
No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

Motion for Leave to File Brief Amicus Curiae on Behalf of California State Assemblyman Mike Cullen and Brief Amicus Curiae.

Assemblyman MIKE CULLEN, a member of the California Legislature, respectfully moves the Court for leave to file the accompanying brief *amicus curiae* in this case.

Movant is the author of Assembly Concurrent Resolution 34 passed by the Legislature and reprinted in plaintiff's Motion for Leave to File Complaint and in this Motion as Exhibit "A." This resolution urged the Attorney General to defend the Eastern boundary of California set forth in the 1849 California Constitution.

Since any judicial determination of the California-Nevada geographical boundary north of the 39° parallel in this case may impact the tax revenues of the state of California subject to appropriation by the Legisla-

ture, movant has a direct interest in the case as a representative of the people of California.

Movant believes, from a clear reading of the Complaint, that plaintiff has unwisely restricted its prayer by urging the Court to select an admittedly erroneous boundary surveyed in the last century. In effect, the Court is asked to perpetuate an error of the past and ignore evidence of an accurate alternative. The Court can order a precise measurement of described boundary, *i.e.*, 120th West Meridian, rather than engaging in the judicial legislation of selecting an inaccurate survey line.

Since neither boundary prayed for in the pleadings conforms with the boundary described in the California Constitution of 1849 approved by the Congress, *i.e.*, the 120th meridian of west longitude, movant seeks standing to brief this point in order that the Court will have a complete range of rational alternatives from which to render its judgment.

WHEREFORE, it is respectfully prayed that this Motion for Leave to file the annexed Brief Amicus Curiae be granted.

Respectfully submitted,

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Attorneys for Amicus Curiae.

EXHIBIT A

California Legislature—1977-78 Regular Session

Assembly Concurrent Resolution No. 34

Introduced by Assemblyman Cullen

March 29, 1977

Referred to Committee on Governmental Organization.

Assembly Concurrent Resolution No. 34—Relative to the boundaries of the State of California.

LEGISLATIVE COUNSEL'S DIGEST

ACR 34, as introduced, Cullen (G.O.) State of California: boundaries.

This measure would request the Governor and the Attorney General to take such action as is necessary to verify and defend the boundaries of the State of California as they are set forth in the 1849 California Constitution.

Fiscal committee: yes.

WHEREAS, A question has arisen with respect to the correct location of California's eastern boundary from the southern boundary of the State of Oregon, running south on the 120th degree of west longitude to its intersection with the 39th degree of north latitude; and

WHEREAS, It is essential to maintain the integrity of the boundaries of the State of California as they were constituted and set forth in the 1849 Constitution of the State of California; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Governor and the Attorney General of the State of California are requested to take such action as is necessary to verify and defend the boundaries of the State of California as they are set forth in the 1849 California Constitution; and be it further

Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the Governor and the Attorney General.

IN THE

Supreme Court of the United States

October Term, 1976
No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

vs.

STATE OF NEVADA,

Defendant.

Brief Amicus Curiae on Behalf of California State Assemblyman Mike Cullen.

Question Presented.

In resolving the California-Nevada boundary dispute, should not the Congressionally-approved 120th meridian be established as the demarcation, rather than one of the two admittedly erroneous surveys advocated by the parties? The parties raise the question of a boundary dispute, then ignore the dividing line agreed upon when the states entered the Union.

Interest of Amicus Curiae.

As a representative of citizens of California elected to the California Legislature, movant desires to advance the historical Eastern boundary of California for the Court's consideration in deciding this case. Neither plaintiff nor defendant have advanced the true 120th meridian as an option open to the Court; yet

this is the boundary agreed upon by both states and approved by Congress. Calif. Const. of 1849, Art. XII, §1, (now Calif. Const. Art. III, §2); Nevada Const. Art. 14, §1; Act of Sept. 9, 1850, c. 50, 9 Stat. 452; Act of March 21, 1864, c. 36, 13 Stat. 30; Proclamation No. 22, 13 Stat. 749 (Oct. 31, 1864). Rather, the parties seek judicial legislation in the fixing of an erroneous survey by Court decree.

The 120th meridian boundary would inure to the benefit of the citizens of California by bringing into the state approximately 80 square miles of land now governed by the state of Nevada. Under present technology, this meridian can be accurately fixed to within a few feet. The relative position of the boundary lines are shown on Exhibit 2 of the Complaint, and Exhibit 1 attached to this brief. (Reprint of Lake Tahoe chart—2 pages).

ARGUMENT.

Movant adopts, by reference, the background of controversy, surveys and investigations of the 120th meridian boundary set forth in plaintiff's Motion for Leave to File Complaint (pp. 3-10).

Plaintiff prays the Court to determine that the 1873 survey is the true boundary between California and Nevada. Defendant prays that the Court select the 1863 survey as the true boundary. Neither survey accurately fixes the 120th meridian. A third alternative, the true 120th meridian boundary described in the California 1849 Constitution, approved by the Congress, is mentioned only in historical narrative.

A current 120th meridian survey to establish the true boundary is the logical alternative to the prayers of plaintiff and defendant. The Court can order the parties to undertake an accurate survey to fix their agreed boundary.

If a current survey, using available space-age technology, were to confirm the location of the 120th meridian as shown on Exhibit 1, then approximately 80 square miles of land now governed by the state of Nevada would become situated in the state of California. This land is rich in resources, principally timber, and property taxes thereon would redound to the benefit of citizens of California. While there may be other factors for the Court to consider, nonetheless, California's citizens, by virtue of their 1849 Constitution, are clearly entitled to advance the 120th meridian, accurately fixed, as the true boundary between California and Nevada. Since the Attorney General has failed to do so, movant seeks standing to advance this alternative on behalf of the citizens of California.

Conclusion.

Modern survey techniques now make it possible to establish the true 120th meridian within an accuracy range of plus or minus a few feet. A current survey should be undertaken and the resultant location of the 120th meridian should be adopted as the separation between California and Nevada above the 39° parallel.

Respectfully submitted,

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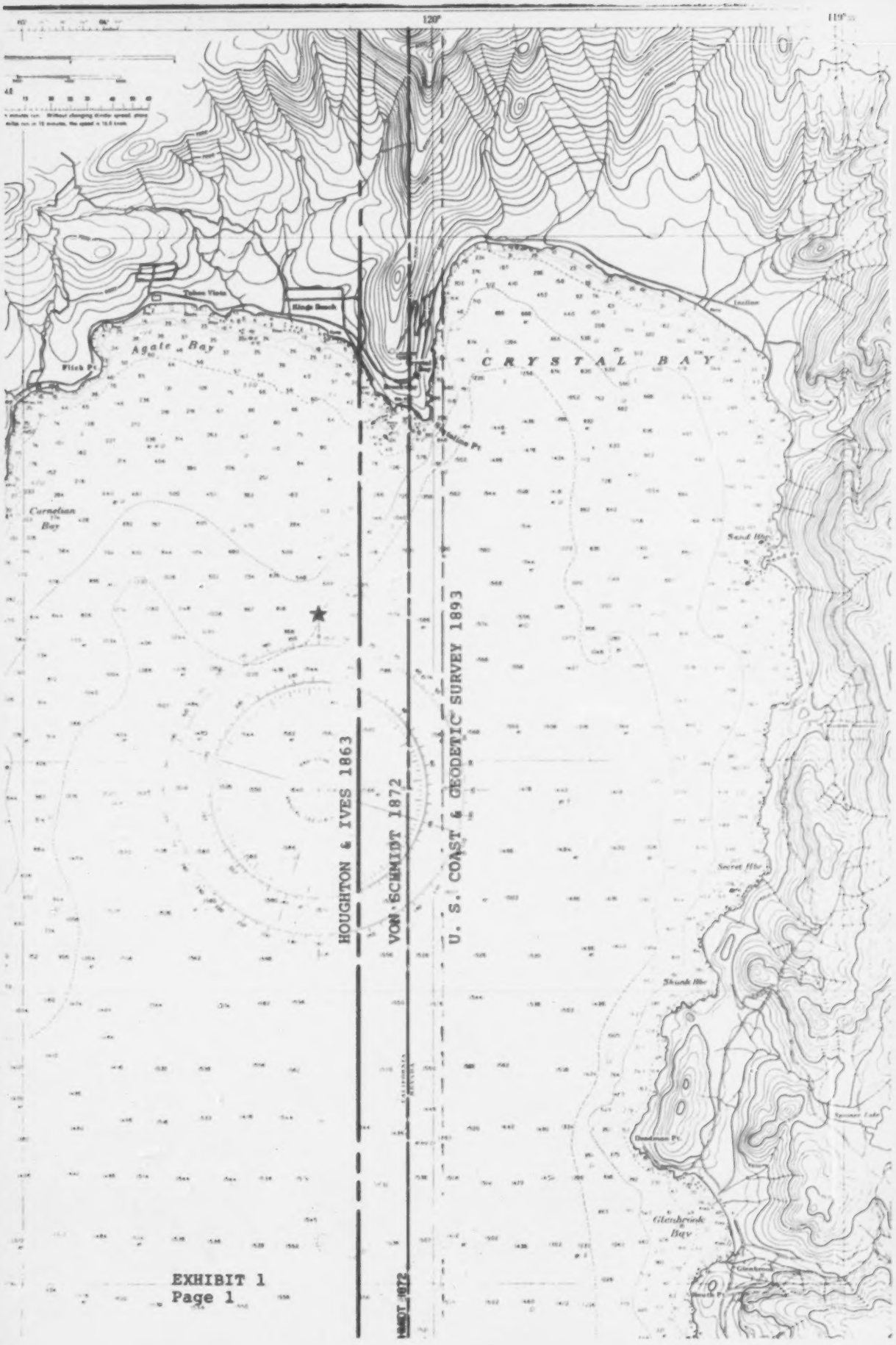
February 8, 1978.



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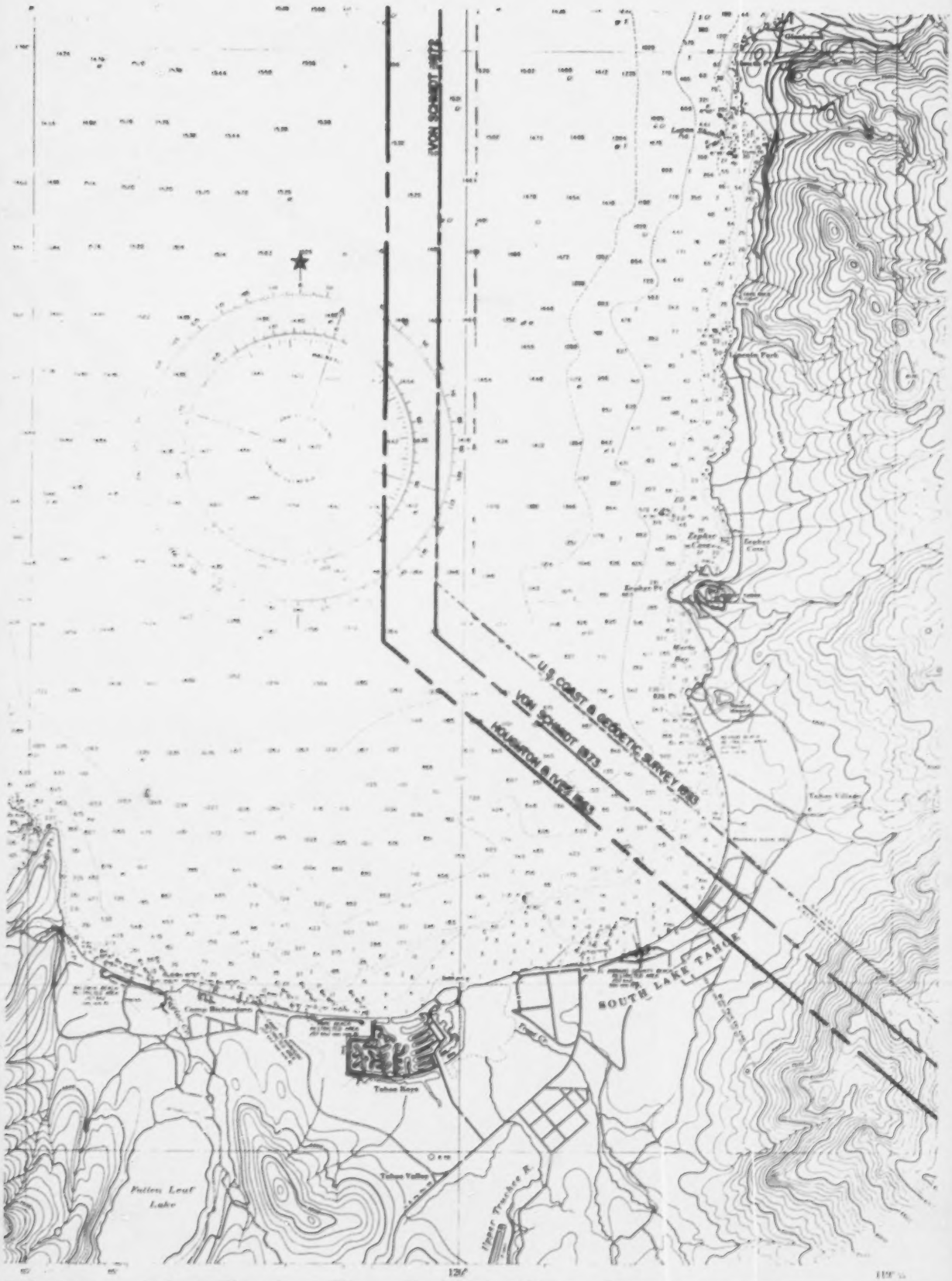

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NATIONAL OCEAN SURVEY

Lake Tahoe

EXHIBIT 1
Page 2

No. 73, Original

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF CALIFORNIA, PLAINTIFF

v.

STATE OF NEVADA

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 73, Original

STATE OF CALIFORNIA, PLAINTIFF

v.

STATE OF NEVADA

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 19, 1980, inviting the Solicitor General to express the views of the United States.

1. Although contemplating future proceedings and making recommendations with respect to them (which we discuss below), the present Report of the Special Master primarily tenders for the Court's approval a determination of the true boundary between the States of California and Nevada. The definition of the two segments of that boundary—one running north-south along the 120th meridian, the other running obliquely from the intersection of the north-south line and the 39th parallel to the intersection of the 35th parallel and the Colorado River—is not in dispute. But, because several inconsistent surveys have purported to map those lines, or portions of them,

the question arises which survey should be accepted as effectively locating the boundary, or whether a new survey should be run.

We endorse the Special Master's solution of the problem. He concluded that the last complete survey of the north-south boundary, the so-called Von Schmidt line of 1872, should be adopted for that segment, and the subsequent Coast and Geodetic Survey line of 1893-1899 should be adopted for the oblique segment of the boundary. Report 49, para. 1. Both of these lines were run by United States surveyors, pursuant to special Congressional direction. Report 22, 27-28. But it is not for that reason that the Master preferred them. Nor do we support his conclusion on that ground. The Master reached his recommendation because these two surveys were the latest, the most complete and the most accurate (Report 29-34), and, primarily, because both States have acquiesced in treating these lines as the interstate boundary for more than a century in one case and some 80 years in the other. Report 35-37, 45.

In our view, the last consideration is dispositive. In the case of the oblique boundary, both States formally adopted the Coast and Geodetic Survey line by statute in 1901 and 1903. Report 45. While the Von Schmidt north-south line was not similarly confirmed by State legislative action (Report 35), it is undisputed that, ever since 1873, that line has been used by both States in the exercise of jurisdiction. Report 45. In these circumstances, we believe the Master was fully justified in invoking the doctrine of prescription and acquiescence as laying the matter to rest. Report 41-48. See *Ohio* v. *Kentucky*, 410 U.S. 641, 649-651 (1973), and cases there cited.

2. After recommending the lines which, in his view, represent the true boundary between the two States, the Special Master turns to minor technical matters. Because the recommended north-south line and the oblique line do not intersect exactly at the 39th parallel (as, in principle, they should), the question arises how they should be connected. The Master urges that the State parties should be free to resolve that matter by agreement, failing which he would recommend a solution. Report 49-50, para. 2. In fact, as we read their respective briefs, California and Nevada have already agreed that the appropriate course, assuming the Court approves the Master's major boundary determinations, is to extend the oblique boundary in a straight line to the point where it meets the north-south boundary (Nev. Br. 45, 51; Cal. Br. 49-51),[1] thereby avoiding what California aptly characterizes as "unsightly dog-legs" in the middle of Lake Tahoe (Cal. Br. 50). The simplicity of this resolution commends it, in our view, and we urge the Court to accept that determination.

The Special Master also seeks authority to arrange for any necessary further resurveying of the lines he has recommended if the parties disagree as to their location on the ground. Report 50, para. 3. The cost would be borne equally by the two States. *Ibid.* Although we are not aware of any dispute as to the location of these lines, again, the Master's recommendation seems entirely reasonable. The United States would, of course, fully cooperate in any necessary work by supplying all relevant information at the disposal of the Government.

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[1]We here refer to the documents entitled "Nevada's Exceptions to Report of Special Master and Brief" and "Plaintiff's Brief in Support of Special Master's Report," both filed in December 1979.

3. We come now to the Special Master's final recommendations (Report 50-51, paras. 4-6), suggesting further proceedings to settle the title consequences of a ruling by the Court endorsing his boundary determinations. That matter arises because, in May 1979, California submitted to the Special Master a Motion to File Amended Complaint and Bifurcate Issues which alleged that the United States has confirmed or clear-listed lands in California to Nevada, and vice-versa, in derogation of the controlling grant statutes; that most such lands were in turn patented to individuals by the State which had obtained federal approval; and that the validity of these State selections and the patents issued under them is in doubt. See Report 11-13.

a. The existing parties appear to agree that "title" proceedings to resolve these questions, if appropriate at all, ought to follow, rather than precede, this Court's final decision fixing the interstate boundary. See Report 14. For our part, we endorse that course. Any effort to quiet titles along the boundary must obviously await a binding determination as to its location, still disputed between the States. There remains to consider, however, whether such proceedings, in this Court, are necessary, and, if so, what role the United States should play.

b. If all the territory disputed between the two States were still held by the United States—whether as part of the public domain or in reserved status—or if the lands had been patented directly by the United States to individuals, fixing the interstate boundary would affect only political jurisdiction and no further title proceedings would be necessary. But substantial acreage has passed into State hands and most of it, in turn, to private owners, and it appears that some of these selections were made, and subsequent patents issued, by each State in

what is the territory of its neighbor – or at least by Nevada in California. California has questioned the validity of such extraterritorial selections and patents and seeks leave to file an amended complaint putting the matter at issue. Nevada apparently asserts that at least private titles, although derived from a sovereign acting beyond its jurisdiction, are not open to challenge, but seems to agree that the matter should be settled. In these circumstances, a genuine controversy exists and, when the boundary is finally fixed, further proceedings to resolve the title questions seem unavoidable.

It might be supposed that the title consequences could be resolved by administrative proceedings within the Department of the Interior. But it is far from clear that that Department retains jurisdiction to correct any error in approving or "clear-listing" selections made by one State in the territory of the other, especially where patents to individuals have issued. Moreover, neither State suggests that it would accept such administrative determinations if undertaken. Nor does it seem possible to finally resolve the matter in a quiet title action initiated in a district court by one State against the United States under 28 U.S.C. 2409a. Insofar as the States themselves are at odds over the question, this Court is the only federal forum with jurisdiction. 28 U.S.C. 1252(a)(1); *California* v. *Arizona*, 440 U.S. 59, 61, 63 (1979). Accordingly, the Special Master was correct, we believe, in recommending that California be granted leave to file its amended complaint (Report 50, para. 4) albeit without presently joining any federal defendants.

c. We reach, finally, the question of the role of the United States in any such further proceedings. Although he has recommended allowance of California's amended complaint, which names the United States and the

Secretary of the Interior as added defendants, the Special Master clearly intends to reserve the matter of joining the federal Government until after he has consulted further with the present parties and the Office of the Solicitor General. Report 50, para. 5. We welcome that course.

To be sure, there is no longer any doubt that the United States can be joined as a defendant if it asserts title to any of the lands in dispute. *California* v. *Arizona, supra.* Nor do we suppose this Court lacks jurisdiction to entertain an action in which both States, in controversy with each other, seek to compel the Department of the Interior to rescind or confirm earlier administrative decisions approving erroneous State selections, if that Department still has competence in the matter. See 5 U.S.C. 702. But it may well be that the United States will disclaim all interest in the disputed lands and the Master may conclude that the Department of the Interior has long since lost jurisdiction to take any curative action. In that event, it would not seem necessary or appropriate to join the United States or its officers in the contemplated title proceedings.

Because the United States has not yet reached a final conclusion as to its interest or competence in respect of the lands at issue, the Master's recommendation seems entirely appropriate. Should the United States fail, promptly after this Court's boundary determination, formally to disclaim all interest in the contested acreage, or fail to satisfy him that the Government is powerless to take remedial action, the Special Master, we suggest, should be authorized to join the United States as a party defendant in the future proceedings. There is no occasion to prejudge the outcome of the contemplated consultations at this stage. At all events, the United States

would, of course, afford the Master all reasonable assistance in carrying out his task.

Respectfully submitted.

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Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

MARCH 1980

DOJ-1980-03